Petition

81-297

No. ————

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

SHREVE EQUIPMENT, INC.,
a Corporation
Petitioner,

v.

CLAY EQUIPMENT CORPORATION,
a Corporation
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

ALAN S. WARD
(Counsel of Record)
Baker & Hostetler
818 Connecticut Avenue, N.W.
Washington, D.C. 20006
(202) 861-1500

WAYNE C. DABB, Jr.
Baker & Hostetler
3200 National City Center
Cleveland, Ohio 44114
(216) 621-0200
Attorneys for Petitioner

COURT INDEX PRESS, INC. — 215 E. Ninth Street, Cincinnati, Ohio 45202 — (513) 241-1450

QUESTIONS PRESENTED

1. Was a farm equipment manufacturer's cumulative annual volume discount program "functionally available" for Robinson-Patman Act purposes to all of its dealers when it was conditioned upon one dealer's president and practically sole shareholder terminating his incidental employment with the manufacturer for the dealer to qualify for the discount program?

2. Is the causal link between the antitrust violation and the injury suffered which is necessary for liability under Section 4 of the Clayton Act broken because the victim went along with the antitrust violation even though it did so to avoid the loss of an established business relationship?

3. May a Court of Appeals affirm a clearly erroneous finding of fact without discussing it or whether it was supported by any evidence?

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Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Petitioner, Shreve Equipment, Inc. ("Shreve") respectfully prays that a writ of certiorari issue to review the opinion and judgment of the United States Court of Appeals for the Sixth Circuit, entered on May 18, 1981, which reversed the judgment of the District Court for the Northern District of Ohio awarding Shreve the sum of $44,145.00 plus reasonable attorney's fees pursuant to Section 4 of the Clayton Act, 15 U.S.C. § 15, for price discrimination in violation of section 2(a) of the Clayton Act as amended by the Robinson-Patman Act, 15 U.S.C. § 13(a) ("the Robinson-Patman Act").

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit, unofficially reported at 81-1 Trade Cases ¶ 64,016 (1981), appears in the Appendix at p. 1a. The opinion of the United States District Court for the Northern District of Ohio, unreported, appears in the Appendix at p. 15a.

JURISDICTION

The judgment of the United States Court of Appeals for the Sixth Circuit was entered on May 18, 1981. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1). This Petition was filed within ninety days of the entry of judgment by the Sixth Circuit.

THE STATUTES INVOLVED

The statutes involved are Section 2(a) of the Robinson-Patman Act, 15 U.S.C. § 13(a), and Section 4 of the Clayton Act, 15 U.S.C. § 15. The pertinent portion of Section 2(a) of the Robinson-Patman Act provides:

> It shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality, where either or any of the purchases involved in such discrimination are in commerce, where such commodities are sold for use, consumption, or resale within the United States or any Territory thereof or the District of Columbia or insular possession or other place under the jurisdiction of the United States, and where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure or destroy or prevent competition with any person who either grants knowingly or receives the benefit of such discrimination or the customers of either of them. . . .

Section 4 of the Clayton Act, 15 U.S.C. § 15, provides as follows:

> Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefore in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee.

STATEMENT OF THE CASE

Parties

Clay Equipment Corporation ("Clay"), the Respondent, is an Iowa manufacturer of farm equipment which sells its products in interstate commerce, primarily to independent dealers. Shreve, the Petitioner, is an Ohio corporation engaged in the retail sale of farm equipment, which is located in Shreve, Ohio.[1]

Shreve was an authorized dealer for Clay farm equipment from its incorporation in 1962 until its dealership was terminated by Clay in 1975. Shreve also sold several other brands of farm equipment. Its sales of Clay equipment comprised about 20% of its total sales during the years in question.

Respondent's Pricing System

Clay's pricing system for the farm equipment it sold to its dealers had two main features, the base price and the volume discount plan. The base price for a piece of equipment was the same for all dealers, determined by

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[1] Shreve, Ohio is a small farm town of 2,000 people.

deducting 30% from Clay's published list price for its equipment. In 1964, Clay began offering its dealers a volume discount plan, as well. Under that plan, a dealer received an additional discount which was determined by the amount of the dealer's cumulative annual purchases of Clay farm equipment. The discounts were granted according to a sliding scale: the more equipment a dealer purchased during the year, the higher the percentage of discount it received. In actual practice, the discounts under this plan ranged from 2% to over 8%. Dealers receiving the discounts thus obviously paid lower net prices for each item of farm equipment purchased from Clay during the discount year than dealers not receiving the discount.

Market and Competitors

Shreve competed directly with several Clay dealers who received the volume discounts. Shreve's primary market area during 1971 through 1974 was within a 50-mile radius of Shreve, Ohio; three other Clay dealers were located within and competed directly with Shreve in that area. Three more Clay dealers were located outside Shreve's primary market area, but had market areas which overlapped Shreve's. In addition, Shreve made other sales beyond the 50-mile radius.

Each of these dealers sold one or more of the same lines of Clay equipment as sold by Shreve. Each sold Clay equipment on the retail level primarily to farmers. Each purchased Clay equipment contemporaneously with Shreve's purchase of numerous items of identical Clay equipment. Each dealer, *except Shreve,* received Clay's volume discounts in varying amounts, depending upon total sales for the year.

Respondent's Denial of Volume Discounts to Petitioner

In the years 1971 through 1974, Shreve's purchases from Clay qualified to receive Clay's volume discount. Shreve had total purchases from Clay for this period in the amount of $356,003.14. Yearly purchases were as follows: 1971 – $63,045.85; 1972 – $78,442.04; 1973 – $74,447.95; 1974 – $140,147.30. Based on Clay's volume discount plan for these years, Shreve was entitled to receive discounts as follows: 1971 – $4,304.58; 1972 – $5,844.20; 1973 – $5,444.79; 1974 – $12,014.73. However, Clay denied *any* volume discounts to Shreve in each of these years.

Clay's reason for denying volume discounts to Shreve in the years 1971 through 1973 was the fact that Shreve's president and practically sole shareholder, Robert Robinson, was coincidentally employed by Clay at the time as its territorial manager for Northeastern Ohio. Although Robinson continued as Shreve's president and practically sole shareholder and as Clay's territorial manager in 1974, Clay denied Shreve its volume discounts for that year on the ground that Shreve's account had been past due during that year.

Respondent's Relationship with Petitioner and Robinson

Robert Robinson has been Shreve's president and practically sole shareholder since its incorporation in 1962. He was a farmer from 1946 until 1956, when he formed Robinson Farm Supplies, and became a Clay dealer. He operated this business until 1959, when he and a partner opened Shreve Hardware and Farm Supply, which was also a Clay dealer. In 1962, the partnership was dissolved, and Shreve was incorporated.

Sometime in April, 1966, Virgil Bonecutter, Clay's branch manager, approached Robinson about going to

work for Clay as a territorial manager.[2] Bonecutter told Robinson he could continue to run Shreve if he accepted the offered employment with Clay. He never said Shreve would lose Clay's volume discounts if Robinson went to work for Clay. Around that time, Robinson also had some telephone discussions with G. E. Lewis, then Clay's general sales manager, about Clay's proposed employment of Robinson. Lewis likewise told Robinson that he could continue to run Shreve while working for Clay, but also did not tell him that Shreve would lose Clay's volume discounts if he accepted Clay's employment. Nor did anyone else from Clay ever tell Robinson that if he became territorial manager, Shreve would lose the volume discount.

Robinson had regularly dealt with Lewis and Bonecutter over a ten-year period, and both of them knew of his relationship with Shreve. In fact, on April 21, 1966, Lewis wrote a letter to Bonecutter, advising him not to hire Robinson for that reason. Nevertheless, a month later, on May 23, 1966, Clay hired Robinson as a territorial manager, while he continued to run Shreve. The employment contract between Clay and Robinson, which was prepared by Clay, contained no provision prohibiting Robinson from continuing to run Shreve, although it did restrict Robinson to making only 25% of the sales of Clay equipment in his territory through Shreve.

Only after Robinson had worked for Clay for six months did he find out that Clay was going to deny volume discounts to Shreve because of his employment by Clay. At the end of the 1966 discount year when he received the volume discount checks for the other dealers in his Clay

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[2] Clay's territorial managers are Clay's representatives to its independent dealers. Their duties include establishing, training, and communicating with dealers and collecting accounts. They generally do not make direct sales to customers, and accompany a dealer on a sales call only at the dealer's request.

territory, he did not receive one for Shreve even though he knew Shreve had qualified for the volume discount and he knew of no reason why Shreve should not receive it. Then, *for the first time,* Clay told him it would not grant volume discounts to Shreve because he was employed by Clay. Shreve and Clay argued the point, and Clay eventually paid Shreve part of the 1966 volume discount.

Although Clay inserted a provision in Robinson's 1967 employment contract denying volume discounts to Shreve, it deleted that provision from his subsequent employment contracts. Clay recognized that Robinson continued to run Shreve, and knew that Shreve and Robinson were separate persons. Shreve continued to seek Clay's volume discounts, and the volume discounts became a continuous dispute between Shreve and Clay.

Robinson fully performed the services required by his employment contracts with Clay. As Clay's territorial manager, he successfully established fifteen new Clay dealerships in his territory. He directed national sales leads he received from Clay as territorial manager to the Clay dealer geographically closest to the potential customer, and did not use his position as territorial manager to gain competitive advantage for Shreve over other Clay dealers in his territory.

In June, 1972, Clay's new general sales manager, Charles Chamness, met with Robinson on a trip to Ohio. Robinson testified that in that meeting Chamness told him that Clay's denials of volume discounts to Shreve were illegal, and that he would work out a way for Clay to grant them to Shreve in the future; and Chamness admitted that he told Robinson in that meeting that Shreve should receive volume discounts. This was the first Shreve had any knowledge that Clay's denial of volume discounts to Shreve violated the antitrust laws. Before this time Shreve did not know that it had a claim against Clay for price dis-

crimination; by this time Shreve's claim for some years was already barred by the statute of limitations.

In the spring of 1973, Chamness told Robinson that Clay would grant volume discounts to Shreve in the 1974 discount year using as a pretext the fact that Robinson's son was graduating from college and going to work for Shreve. Clay thereafter agreed in writing to grant its volume discounts to Shreve beginning in the 1974 discount year, without imposing any requirement that Robinson terminate his relationship with Shreve for Shreve to be eligible for such volume discounts. Robinson continued as a Clay territorial manager and as president and owner of Shreve throughout 1973 and 1974 with Clay's knowledge.

However, Shreve did not receive Clay's volume discounts in 1974, either. Around October 15, 1974, Shreve received a letter from Chamness stating that Shreve would not receive the volume discounts for 1974 on the alleged ground that Shreve was not eligible for volume discounts because its account was past due. Robinson immediately telephoned Chamness because this was the first time he had heard that Shreve's account was past due, although as Clay's territorial manager he would normally have received prior notification in that capacity if Shreve's account had been past due, and he had never received any such notification.

He also reviewed Shreve's records to determine whether Shreve's account with Clay had been paid timely during the 1974 discount year, and found a cancelled check for each month's payment from October, 1973 until December 21, 1974. Furthermore, Clay did not charge Shreve any service charge for a past due account during 1974 (except one which was an admitted error), although it was Clay's usual practice to do so. In fact, although Clay's records showed the contrary, Shreve's account actually had a credit balance from February through July, 1974. This result

stemmed from the fact that Clay's statements of its dealers' accounts did not record every transaction at this time. Clay later changed its accounting system to remedy this deficiency, and began to report every transaction with a dealer.

Petitioner's Claim and Damages Caused by Respondent's Price Discrimination

In August, 1975, Shreve brought this action alleging that Clay was guilty of price discrimination against it during the years 1971-1974 because Clay denied Shreve any volume discounts during these years while granting them to other Clay dealers which were in competition with Shreve. At trial, Shreve's economist testified that Clay's denial of volume discounts to Shreve while granting them to competing Clay dealers *substantially lessened* Shreve's ability to compete with other Clay dealers for sales of Clay farm equipment. Such conclusion was based on the following uncontroverted facts. *First,* the manufacture of the farm equipment involved is concentrated among a relatively small number of firms; sales of such farm equipment at the dealer level are thus concentrated among a few brands; and, as a result, intra-brand competition is most important to effective competition with the farm equipment industry.

Second, in 1971 through 1974, price was a major factor in the competition for sales of Clay farm equipment by Shreve and competing Clay dealers, although non-price factors also affected such competition. Both price and non-price competition affect a dealer's profit margin: Price competition reduces the profit margin by decreasing the revenues received, while non-price competition reduces it by increasing costs. Consequently, the receipt or non-receipt of Clay's volume discounts (and the amounts re-

ceived) directly affected prices charged, costs incurred, and profit margins realized by Shreve and competing Clay dealers.

Third, Shreve, as well as other Clay dealers which were denied the volume discounts or received only small volume discounts, experienced slower sales growth than those which received the volume discount. Clay dealers in Ohio which were denied the volume discounts had a higher failure rate than those which received the discounts; and similarly, those Clay dealers that only occasionally received Clay's volume discounts, or received only a small discount, also had a high failure rate. In addition, the level of concentration of sales of Clay farm equipment increased significantly both nationally and in Ohio among Clay dealers which received the volume discounts. Thus, Clay's volume discount plan and its denial of volume discounts to Shreve while granting large volume discounts to competing Clay dealers substantially lessened competition among the dealers for sales of Clay farm equipment to farmers.

Clay's denial of volume discounts to Shreve substantially lessened Shreve's ability to compete with other Clay dealers for sales of Clay farm equipment. Shreve lost substantial sales as a result of Clay's denial of volume discounts. Shreve lost sales of Clay farm equipment in the amount of $622,584 during 1971 through 1974 as a direct result of the denial of Clay's volume discounts during that period. Shreve's lost net profits on those sales from 1971 through 1974 were $19,732.

Opinions Below

The district Court held that the denial of volume discounts to Shreve during the years 1971 through 1973 constituted price discrimination resulting in significant competitive injury to Shreve, substantially lessening its ability

to compete with other Clay dealers, in violation of Section 2(a) of the Robinson-Patman Act. It entered judgment in favor of Shreve for actual damages of $14,715 during the years 1971-1973, which were trebled to $44,145 pursuant to Section 4 of the Clayton Act, 15 U.S.C. § 15, plus reasonable attorney's fees and costs. However, the District Court denied damages to Shreve for 1974 on the ground that Shreve's account had been past due during that year.

Clay appealed to the Court of Appeals for the Sixth Circuit asserting that the District Court erred in granting judgment to Shreve for the years 1971-1973 when Shreve's president-owner was Clay's territorial manager. Shreve cross-appealed contending that the District Court erred in denying damages for 1974 and for future profits. The Sixth Circuit reversed the judgment for Shreve for the years 1971-1973 and affirmed the judgment for Clay for 1974. On Clay's appeal with respect to the years 1971-1973, the Court held that Clay's volume discounts were functionally available to Shreve and that Shreve's injury was caused, not by the existence of Clay's volume discount plan, but by Robinson's employment by Clay which caused the loss of the volume discounts. On Shreve's cross-appeal with respect to 1974, the Court simply affirmed the District Court's denial of damages for 1974 without any discussion.

This Petition for Certiorari seeks review by this Court of the decision of the Court of Appeals for the Sixth Circuit.

BASIS FOR FEDERAL JURISDICTION IN THE DISTRICT COURT

This case was brought in the District Court pursuant to Section 2(a) of the Robinson-Patman Act, 15 U.S.C. § 13(a), and under Section 4 of the Clayton Act, 15 U.S.C.

§ 15, which permits a suit in the United States District Court by any person who is injured in his business or property as a result of anything forbidden in the antitrust laws, including the Robinson-Patman Act. Jurisdiction in the District Court was also based on 28 U.S.C. §§ 1331 and 1337, the amount in controversy exceeding the sum of $10,000 exclusive of interest and costs.

REASONS FOR GRANTING THE WRIT

The Sixth Circuit's opinion in this case is in conflict with decisions of this Court and other Circuits, and seriously undercuts private enforcement of the federal antitrust laws, in two significant respects: (1) It extends the judicially-created "defense" that discounts are "functionally available" to all purchasers into an absolute bar to recovery by a plaintiff to whom *no* discounts were in reality available at all; and (2) It precludes recovery of damages by a victim of antitrust violations who was forced to go along with a defendant's illegal conduct to avoid the loss of an existing business relationship. The first of these determinations, resulting from the Sixth Circuit's misapplication of the "functional availability" defense on the facts of this case, is in direct conflict with this Court's decision in *FTC* v. *Morton Salt Co.*, 344 U.S. 37 (1948) (*"Morton Salt"*), and the Ninth Circuit's decision in *Fowler Mfg. Co.* v. *Gorlick*, 415 F.2d 1248 (9th Cir. 1969), *cert. denied*, 396 U.S. 1012 (1970) (*"Fowler"*). The second determination is in direct conflict with this Court's decision in *Perma Life Mufflers, Inc.* v. *International Parts Corp.*, 392 U.S. 134 (1968) (*"Perma Life Mufflers"*).

In addition, the important role of effective private enforcement of the federal antitrust laws in the sound functioning of our economic system necessitates this Court's

review and correction of the Sixth Circuit's erroneous and damaging conclusions. Our economy is based upon principles of competition; that competition is governed and ensured by the federal antitrust laws. The effectiveness of the federal antitrust laws depends, in large measure, upon private enforcement; it is well-known that private enforcement of the antitrust laws has been a very significant factor in antitrust enforcement. As a result, the questions raised in this Petition, which bear directly on the private enforcement of the federal antitrust laws, are important to the sound functioning of our economic system.

This is particularly true because the facts of this case plainly show that Shreve suffered substantial injury as a direct result of Clay's illegal price discrimination. If Clay is allowed to escape liability for its wrongful conduct only because of a mistaken application of the "functional availability" defense and a twisted interpretation of the causation required for antitrust liability, then the federal antitrust laws will be rendered impotent and ineffective to assure the sound functioning of our economic system. Such a result should not be allowed and Shreve's Petition for Certiorari should be granted for each of the reasons discussed below.

Finally, the Sixth Circuit's failure to discuss any issue raised by Shreve's cross-appeal is such a breach of sound appellate practice and a denial of due process of law that Shreve's Petition for Certiorari should be granted so that this Court can exercise its supervisory power over the appellate courts.

1. THE SIXTH CIRCUIT MISAPPLIED THE "FUNCTIONAL AVAILABILITY" DEFENSE ON THE FACTS OF THIS CASE.

The Sixth Circuit basically accepts the facts as found by the District Court, but rests its decision in this case largely on its erroneous conclusion that Clay's volume discounts were "functionally available" to Shreve. The Court begins by stating that "[w]here a purchaser does not take advantage of a lower price or a discount which is functionally available on an equal basis, it has been held that either no price discrimination has occurred, or the discrimination is not the proximate cause of the injury", citing a number of appellate and trial court decisions. Then, without any explanation, it leaps to the conclusion that Clay's volume discounts were "functionally available" to Shreve on equal terms because all it had to do to qualify for the discounts was have its president and owner terminate his incidental employment with Clay (App. 9a-10a), when Section 2 (a) of the Robinson-Patman Act requires a seller to treat all buyers equally.

In making this enormous leap, the Sixth Circuit completely ignored the fact that in *none* of the cases it cited for its general statement of the "functional availability" defense had *any* court held that the defense applied when availability of discounts or allowance was *conditioned* upon some affirmative action by a purchaser other than simply buying the product. *Sweeney & Sons, Inc.* v. *Texaco, Inc.*, 637 F.2d 105, 120-121 (3d Cir. 1980) (Hauling allowance for gasoline varied with location of purchasers' storage tanks even though some purchasers made deliveries directly to service stations); *FLM Collison Parts, Inc.* v. *Ford Motor Co.*, 543 F.2d 1019, 1024-25 (2d Cir. 1976), *cert. denied*, 429 U.S. 1097 (1977) (All franchised Ford dealers

received discounts on parts they purchased for resell to repair shops, but not on parts they purchased for use by their own service departments); *Tri-Valley Packing Assn.* v. *FTC,* 329 F.2d 694, 703-04 (9th Cir. 1964) (Sales to different buyers at different prices *in different markets* raised an issue regarding the meeting competition defense; all buyers had to do to get same price was purchase in same market); *Mowery* v. *Standard Oil Co. of Ohio,* 463 F. Supp. 762, 775-76, n. 17 (N.D. Ohio 1976), *aff'd without opinion,* 590 F.2d 335 (6th Cir. 1978) (The defendant offered a temporary competitive allowance to all independent dealers on "precisely the same terms" during most of the period; the District Court, therefore, allowed the plaintiffs to seek recovery *only* for an earlier period where the defendant did limit the availability of the allowance to certain dealers); *World-Wide Volkswagen Corp.* v. *Autobahn Motors Co.,* 1980-81 Trade Cases ¶ 63,601, p. 77,197 (S.D.N.Y. 1980) (Seller assessed a uniform delivery charge even if dealer picked up own vehicles: Therefore, all dealers paid the same price); *Interstate Cigar Co.* v. *Sterling Drug Co.,* 1980-2 Trade Cases ¶ 63,430, pp. 76,253-254 (S.D.N.Y. 1980) (New distributor discount was available only to new distributors, it was available to all new distributors equally and an equivalent discount was available to old distributors); *Rod Baxter Imports* v. *Saab-Scania of America, Inc.,* 489 F. Supp. 245, 248, n. 2 (D. Minn. 1980) (Plaintiff failed to meet a reasonable sales quota which was necessary to qualify for certain discounts, and there was no evidence that the quota was unfair); *Beam* v. *Monsanto Company, Inc.,* 414 F. Supp. 570, 587 (N.D. Ark. 1976) ("The plaintiffs were offered the same product for the same price for delivery on the same job on the contract letting day", although only one of them could win the government contract). It likewise overlooks the fact that the District Court found that

Robinson, unlike any other dealer, rendered substantial personal services to Clay as a territorial manager, and Clay's compensation to Robinson for such services was well-earned.

The Sixth Circuit then brushes aside the District Court's holding that Clay's volume discounts were unavailable to Shreve because their availability was premised on the *burdensome condition* that Robinson terminate his incidental employment with Clay in order for Shreve to qualify for the discounts. The Sixth Circuit did not hold that the *condition* was not *burdensome* (which it plainly was), but merely rationalized that the burdensome condition was not imposed on competing buyers because none of them were employed by Clay and that Robinson voluntarily accepted employment with Clay. However, neither of these superficial rationalizations alters the fundamental fact that Clay's volume discounts were not available to Shreve on the same terms as they were available to other Clay dealers, namely by simply purchasing Clay products, but rather were available only to Shreve upon the extremely burdensome condition that its president-owner terminate his incidental employment with Clay. As a result, Clay's volume discounts were, as a practical matter, unavailable to Shreve.

(a) The Sixth Circuit's Decision Conflicts Directly With Decisions Of This Court And Of The Fifth And Ninth Circuits.

In *Morton Salt*, 334 U.S. at 41, the Court considered a discount plan much like Clay's plan here, in which the discounts the buyers received depended upon the amount of salt purchased. The Court held that "[t]heoretically, these discounts are equally available to all, but functionally they are not" because not all buyers could make pur-

chases of sufficient size to qualify for any discounts. 334 U.S. at 42-43. Thus, this Court held that discounts are not functionally available to all buyers on equal terms unless all buyers can, as a practical matter, qualify for the discounts by doing nothing more than purchase economically reasonable quantities of a product. 334 U.S. at 42-44. To the same effect is *American Can Co.* v. *Bruce's Juices, Inc.*, 187 F.2d 919, 923-924 (5th Cir.), *modified*, 190 F.2d 73 (5th Cir.), *app. dismissed*, 342 U.S. 875 (1951).

The Sixth Circuit's decision conflicts directly with *Morton Salt* and *Bruce's Juices* by holding that Clay's volume discounts were available to Shreve even though Shreve, and only Shreve, was required to have its president-owner terminate his employment in order for Shreve to qualify for the discounts. *Morton Salt* and *Bruce's Juices* make it clear that only conditions which apply to and can practically be satisfied by all buyers equally can be imposed if a discount is to be "functionally available" to all buyers on equal terms. The Sixth Circuit's decision here is contrary to that sound principle of *Morton Salt* and *Bruce's Juices*, and should be reversed. Curiously, the Sixth Circuit's opinion never cites or mentions this Court's decision in *Morton Salt*, although *Morton Salt* is the landmark case in this area, and the case in which the "functional availability" defense was first announced.

Although the Sixth Circuit does discuss *Fowler*, 415 F.2d at 1248, its decision here also conflicts with the Ninth Circuit's decision in that case. In *Fowler*, the defendant argued, as Clay did in the Sixth Circuit, that even though it charged the plaintiff a higher price, there was no liability for price discrimination because the plaintiff fared just as well, as the defendant had made other concessions to him. The Ninth Circuit rejected this argument, holding:

> Equally without validity under the [Robinson-Patman] Act is Fowler's contention that the question of injury was required to be considered in relation to such other concessions or adjustments as had occurred between it and Thrifty through the course of the period involved, and that the fact of damage had to be resolved on the basis of whether, in its over-all dealings with Fowler, Thrifty had come out in as good or better a position as Keller, Rosen, and Mesher. 415 F.2d at 1253-1254.

Here, however, the Sixth Circuit concluded that Shreve benefitted more by Robinson's employment with Clay than it would have if it had received the volume discounts (App. 10a). In doing so, the Sixth Circuit ignores the fact that Robinson actually performed *personal services* for Clay for which he received the salary and commissions the Sixth Circuit thought equivalent to the volume discounts – something no other Clay dealer was required to do to obtain the volume discounts, and the fact that the net result of treating Robinson's salary and commissions as the equivalent of the volume discounts received by other dealers is that Robinson will have worked for Clay for *less than the minimum wage*, if not for *free!*

(b) Whether A Discount Is "Functionally Available" When It Is Conditioned On A Burdensome Condition Is An Important Question To The Private Enforcement Of The Robinson-Patman Act Requiring A Definitive Answer By This Court.

The "functional availability" defense to a price discrimination claim is not a statutory defense which is contained in the Robinson-Patman Act. Rather, it was created by this Court's holding in *Morton Salt* that "[t]heoretically,

these discounts are equally available to all, but functionally they are not." 334 U.S. at 42. However, this defense has not had any further exposition by this Court, although, as the Sixth Circuit's opinion in this case reveals, it is a defense which has been applied by District Courts and Courts of Appeals in a wide variety of Robinson-Patman cases (App. 9a). Accordingly, it is important for this Court to provide guidance to the other federal courts with respect to the proper application of the "functional availability" defense.

One important aspect of such defense is presented by this case: Whether a discount is "functionally available" to all dealers on equal terms when one dealer's president-owner is required to terminate his incidental employment with the defendant as a condition of the dealer's qualification for volume discounts. The Sixth Circuit held that the discounts were "functionally available" despite the fact that such a burdensome condition was imposed only upon one of its dealers with the result that the dealer did not receive the discounts (App. 10a). For the reasons stated above, Shreve submits that the Sixth Circuit's conclusion is in error and that its opinion in this case will seriously hinder private enforcement of the Robinson-Patman Act if it is allowed to stand. Only this Court can correct the Sixth Circuit's misapplication of the "functional availability" defense in this case. If certiorari is not granted such misapplication will in effect be approved.

2. THE SIXTH CIRCUIT ERRONEOUSLY CONCLUDED THAT THE CAUSAL LINK REQUIRED FOR ANTITRUST LIABILITY UNDER SECTION 4 OF THE CLAYTON ACT WAS BROKEN BY THE VICTIM GOING ALONG WITH THE DEFENDANT'S ANTITRUST VIOLATION EVEN THOUGH IT WAS FORCED TO DO SO TO AVOID THE LOSS OF AN ESTABLISHED BUSINESS RELATIONSHIP.

The Sixth Circuit correctly stated the general rule that "[t]o recover treble damages the plaintiff has the burden of proving a causal connection between the antitrust violation and the damages suffered" (App. 9a). But it erroneously concluded that such causal link was broken in this case because Robinson voluntarily accepted employment with Clay and Shreve was thereby disqualified from receiving Clay's volume discount. Thus, the Sixth Circuit held that Robinson's employment with Clay, not Clay's price discrimination, caused any injury Shreve suffered (App. 10a).

This conclusion overlooks the facts that Clay did not tell Robinson before he accepted employment with Clay that such employment would disqualify Shreve to receive Clay's volume discounts; Robinson learned that such a disqualification would result only after he had worked for Clay for six months; Shreve's eligibility for the volume discounts became a continuous dispute between Shreve and Clay; Shreve was forced to go along with Clay's denial of volume discounts in order to avoid having to have Robinson terminate his employment with Clay. Given these facts, it is hard to see how the Sixth Circuit could conclude that Shreve's injury was caused by Robinson's *voluntary choice* of an em-

ployment relationship with Clay instead of the volume discounts.

This conclusion is all the more inexplicable for the following reasons.

(a) The Sixth Circuit's Conclusion On Causation Is In Direct Conflict With This Court's Decision in Perma Life Mufflers.

In *Perma Life Mufflers,* 392 U.S. 134, the defendants, much like Clay in the Sixth Circuit, argued that plaintiffs should be denied recovery for defendants' antitrust violations because the plaintiffs had *voluntarily agreed* to the antitrust violations and had profited immensely from them. The District Court, like the Sixth Circuit here, accepted this argument, and it entered summary judgment for the defendants, which decision was affirmed by the Seventh Circuit. This Court reversed, holding:

> We cannot accept the Court of Appeals' idea that courts have power to undermine the antitrust acts by denying recovery to injured parties merely because they have participated to the extent of utilizing illegal arrangements formulated and carried out by others. . . . Moreover, even if petitioners actually favored and supported some of the other restrictions, they cannot be blamed for seeking to minimize the disadvantages of the agreement once they had been forced to accept its more onerous terms as a condition of doing business. . . . We therefore hold that the doctrine of *in pari delicto* ["of equal fault"], with its complex scope, contents, and effects, is not to be recognized as a defense to an antitrust action. 392 U.S. at 139-140.

See also Simpson v. *Union Oil Co.,* 377 U.S. 13 (1964) (a dealer whose contract was cancelled because he failed to adhere to a fixed resale price could bring an antitrust ac-

tion, even though he participated in the anticompetitive scheme); *Kiefer-Stewart Co.* v. *Seagram & Sons,* 340 U.S. 211 (1951) (a plaintiff in an antitrust suit cannot be barred from recovery by proof that it had engaged in an unrelated antitrust violation).

The Sixth Circuit's opinion in this case is clearly contrary to this Court's holding in *Perma Life Mufflers* because it denies recovery to Shreve for damages it suffered as a result of Clay's price discrimination on the grounds that Shreve voluntarily went along with Clay's denial of volume discounts by Robinson continuing to work for Clay (App. 11a). If the Sixth Circuit's rejection of *Perma Life Mufflers* is allowed to stand, the causation requirement of Section 4 of the Clayton Act will have been so distorted that in the logic of Alice-in-Wonderland, the violation becomes its own defense. This Court should grant certiorari to prevent such an absurd result.

(b) This Court's Correction Of The Sixth Circuit's Erroneous Interpretation Of The Causal Link Required For Antitrust Liability Under Section 4 Of The Clayton Act Is Important To The Effective Private Enforcement Of The Antitrust Laws.

In a number of cases this Court has explained the causal link between the antitrust violation and the injury suffered that is required for antitrust liability under Section 4 of the Clayton Act. E.g., *Brunswick Corp.* v. *Pueblo Bowl-O-Mat, Inc.,* 429 U.S. 477 (1977); *Zenith Radio Corp.* v. *Hazeltine Research, Inc.,* 395 U.S. 100 (1969). Here, the Sixth Circuit has misinterpreted that requirement in a way that undermines the private enforcement of the antitrust laws. This case presents an excellent opportunity for this Court to correct the Sixth Circuit's er-

roneous interpretation and to further delineate the requisite causal link for the other federal courts and the private antitrust bar.

A recurring question in antitrust cases is whether the causal link between the antitrust violation and the injury is broken by the victim's forced accession to the violation for practical business reasons. That question is squarely presented by the facts of this case as the Sixth Circuit held that the causal link was broken by Robinson's employment with Clay, the alleged reason Clay denied Shreve the volume discounts during 1971-1973. Shreve submits that Clay's denial of volume discounts was price discrimination in violation of the Robinson-Patman Act and that the causal link between the violation and Shreve's injury was not broken merely by the coincidental fact that Shreve's president-owner was also employed by Clay.

3. THE SIXTH CIRCUIT'S AFFIRMANCE OF A CLEARLY ERRONEOUS FINDING OF FACT WITHOUT DISCUSSING IT OR ANY EVIDENCE SUPPORTING IT REQUIRES THE EXERCISE OF THIS COURT'S SUPERVISORY POWER TO ENSURE SOUND APPELLATE PRACTICE AND DUE PROCESS OF LAW.

In its lengthy opinion, the Sixth Circuit *wholly ignored* the issues raised by Shreve's cross-appeal, except to affirm the judgment of the District Court on those points without any discussion. Yet Shreve's cross-appeal raised issues relating to Clay's denial of volume discounts to Shreve for the 1974 discount year which were unrelated to and not governed by the decision reached by the Sixth Circuit on Clay's appeal relating to 1971-1973 and which, if resolved in Shreve's favor, would have required a remand to the Dis-

trict Court with respect to Clay's price discrimination against Shreve in 1974, as the year 1974 could have been an independent ground for an award of damages to Shreve. The principal one of those issues was whether the District Court's finding that Shreve failed to pay its account with Clay on a current basis in 1974 was clearly erroneous.

Despite Shreve's cross-appeal on this issue, despite writing a lengthy opinion on Clay's appeal, and despite the fact that the 1974 discount year stood on its own feet, the Sixth Circuit did not discuss the evidence relating to this finding, the standard of appellate review, or whether or not the finding was clearly erroneous. The Court simply affirmed the judgment below with respect to the year 1974. Such treatment of Shreve's cross-appeal does not comport with sound appellate court practice or with due process of law.

This is exemplified by the more thorough judicial review demonstrated by other Court of Appeals in reviewing findings of fact. For example, in *Tennessee Coal, Iron & R. Co.* v. *Muscoda Local No. 123,* 137 F.2d 176, 181 (5th Cir. 1943), the Fifth Circuit observed that "[u]pon reviewing the judgment as to the facts, an appellate court looks first to the findings of the court below, and then to the evidence in the record to ascertain whether or not those findings are clearly erroneous." In the more recent case of *Slaughter* v. *S. S. Ronde Fyffes Group Ltd.,* 509 F.2d 973, 974 (5th Cir. 1975), the Fifth Circuit likewise stated:

> "Our task on review is to determine whether the trial court sitting, without a jury, based its decision on findings of fact which are clearly erroneous."

The Court then reviewed the evidence with regard to each disputed finding, found that there was sufficient evidence to support each, and affirmed the judgment below.

This is the proper way for a Court of Appeals to adjudicate findings of fact which are appealed.

Similarly, the Tenth Circuit in *Butler Paper Co.* v. *Business Forms Ltd.*, 424 F.2d 247, 249 (10th Cir. 1970), stated:

> "Because the case was before the trial court without a jury, the findings entered will be set aside only on a showing of clear error. The burden is upon the appellant to definitely and firmly convince us that the basis of the entire record, a reversible mistake has been made. We thus proceed to detail the facts. . . ."

The Court then reviewed the evidence in the record, explained that it found certain findings to be clearly erroneous based on the evidence, and reversed the judgment below. 424 F.2d at 250-252.

Indeed, in *Taylor* v. *McKeithen*, 407 U.S. 191, 194 (1972), in a per curiam opinion, although it agreed with the philosophy "that the courts of appeals should have wide latitude in their decisions of whether or how to write opinions", this Court made it clear that there are minimal standards below which a Court of Appeals cannot be allowed to fall. Thus, the Court granted certiorari, vacated the judgment below, and remanded the case to the Court of Appeals because it had "not had the benefit of the insight of the court of appeals" and because the record did not fully inform the Court of the precise nature of the litigation. 407 U.S. at 194.

In accord with the sound practice followed by several Courts of Appeals is the final report of the Commission on Revision of the Federal Court Appellate System on *Structure and Internal Procedures: Recommendations for Change* 50 (1975), which according to *Moore's Federal Practice*, "recommended that in all cases there should be 'some record, however brief, and whatever the form, of the

reasoning which impelled the decision." Quoted in 9 *Moore's Federal Practice* ¶ 236.02, n. 3. The Sixth Circuit failed to follow this sound practice in this case with respect to Shreve's cross-appeal, and although it thought an opinion necessary to explain its decision in Clay's appeal, it failed to evidence that it had even considered Shreve's cross-appeal.

The Sixth Circuit here does not indicate that it gave any considerations to Shreve's review of the evidence in the record on appeal which showed that the District court's finding that Shreve's account was not paid on a current basis in 1974 was clearly erroneous. The District Court had based its finding on the testimony of Clay's credit manager that he had reconstructed Shreve's account *after* Clay denied volume discounts to Shreve in 1974, but no invoice on which Shreve had been past due in 1974 was identified. Furthermore, his reconstruction of Shreve's account was necessary because Clay's account records were inadequate and full of errors: They didn't record every transaction, and they showed a balance due from February through July, 1974 when, in fact, there was a credit balance. In addition, the reconstruction of Shreve's account did not properly consider credit memos which had been issued.

Although Clay claimed that it sent Shreve a notice that its account was past due in January, 1974, there is no evidence that Shreve ever received it. Shreve was not told that its account was past due until October 15, 1974, when Clay denied it volume discounts for 1974. Nor was Clay's territorial manager ever given any notice that Shreve's account was past due at any time in 1974, although it was Clay's usual practice to do so. Clay's credit manager did not remember personally advising Robinson that Shreve's account was past due in 1974.

On the contrary, Robinson testified that he had reviewed

Shreve's records and found that Shreve had paid its account with Clay on a monthly basis during the 1974 discount year, and his testimony was substantiated by Shreve's cancelled checks. Furthermore, Clay never charged Shreve any service charges for a past due account in 1974 (except one which Clay's credit manager admitted was a mistake), although it was Clay's usual practice to charge a service charge on past due accounts.

In light of this substantial evidence, which was brought to the Court's attention, showing that the District Court's finding was clearly erroneous and against the manifest weight of the evidence, the Sixth Circuit's failure to discuss the issue at all falls far below the appropriate standard of appellate adjudication and the requirements of due process of law.

CONCLUSION

For all the foregoing reasons, it is respectfully submitted that a writ of certiorari should issue to review the judgment and opinion of the Sixth Circuit.

Respectfully submitted,

ALAN S. WARD
(Counsel of Record)
BAKER & HOSTETLER
818 Connecticut Avenue, N.W.
Washington, D.C. 20006
(202) 861-1500

WAYNE C. DABB, JR.
BAKER & HOSTETLER
3200 National City Center
Cleveland, Ohio 44114
(216) 621-0200

Attorneys for Petitioner
Shreve Equipment, Inc.

No. ————

In The

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

SHREVE EQUIPMENT, INC.,
a Corporation

Petitioner,

v.

CLAY EQUIPMENT CORPORATION,
a Corporation

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

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APPENDIX TO PETITION FOR A WRIT OF CERTIORARI

ALAN S. WARD
(Counsel of Record)
Baker & Hostetler
818 Connecticut Avenue, N.W.
Washington, D.C. 20006
(202) 861-1500

WAYNE C. DABB, JR.
Baker & Hostetler
3200 National City Center
Cleveland, Ohio 44114
(216) 621-0200

Attorneys for Petitioner

Nos. 79-3217-18

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

SHREVE EQUIPMENT, INC.,
Plaintiff-Appellee, Cross-Appellant,

v.

CLAY EQUIPMENT CORPORATION,
Defendant-Appellant, Cross-Appellee.

APPEAL from the United States District Court for the Northern District of Ohio.

Decided and Filed May 18, 1981.

Before MARTIN, Circuit Judge, and PHILLIPS *and* CELEBREZZE, Senior Circuit Judges.

PHILLIPS, Senior Circuit Judge. This is a treble damage price discrimination action brought pursuant to § 4 of the Clayton Act, 15 U.S.C. § 15, alleging violation of § 2 (a) of the Clayton Act as amended by the Robinson-Patman Act. 15 U.S.C. § 13 (a).

Clay Equipment Corporation (Clay) is an Iowa manufacturer of farm equipment, selling its products in interstate commerce primarily to independent dealers. Shreve Equipment, Inc. (Shreve) is an Ohio corporation engaged in the retail sale of farm equipment in Shreve, Ohio. Shreve sold Clay products as well as equipment produced by other manufacturers.

The president and owner of practically all of the capital stock of Shreve, Robert Robinson, was employed by Clay in 1966 as Clay's territorial manager for Northeastern Ohio, and was so employed during the years 1971-73.

Clay granted year-end rebates to its dealers on their purchases of products according to a sliding scale of discounts based upon the cumulative amount of each dealer's purchases of Clay products during the particular discount year. Rebates were not paid to Shreve in 1971-73 and previous years, beginning with the employment of Robinson by Clay. Clay's reason for not allowing rebates to Shreve was that Shreve's president, Robinson, was employed as Clay's territorial manager. The rebate was not paid to Shreve in 1974 because Shreve's account had been past due during that year.

Shreve brought this action alleging that Clay was guilty of price discrimination against it during the years 1971-74, on the ground that Shreve received no year-end discount or rebates from Clay during this period, while rebates were paid and discounts allowed by Clay to its other dealers in competition with Shreve.

The district court held that rebates were denied to Shreve during the years 1971-73 because Shreve's president was employed as territorial manager and this constituted price discrimination resulting in significant competitive injury to Shreve, substantially lessening its ability to compete with other Clay dealers. Judgment was entered in favor of Shreve for actual damages of $14,715 during the years 1971-73, which were trebled to $44,145 pursuant to § 4 of the Clayton Act, 15 U.S.C. § 15, plus reasonable attorney's fees. The district court denied any damages to Shreve for 1974, on the ground that no volume discount or rebate for that year had been allowed by Clay because Shreve's accounts had been past due.

Both Clay and Shreve have appealed. Clay asserts that the district court erred in granting judgment to Shreve for 1971-73, when Shreve's owner-president was Clay's territorial manager. Shreve contends that the district court erred in denying relief in 1974 and for loss of future profits.

We reverse the judgment for the years 1971-73 and affirm the denial of damages for 1974 and all damages claimed under Shreve's cross appeal.

I

Shreve was an authorized dealer for Clay equipment from its incorporation in 1962 until its dealership was lawfully terminated in 1975.[1] Shreve also sold several other brands of farm equipment. Its sales of Clay equipment comprised about 20 per cent of its total sales during the years in question.

In 1966 Robert Robinson, president of Shreve and its sole shareholder,[2] accepted employment as Clay's territorial manager for all Clay dealers in Northeastern Ohio. Upon Robinson's acceptance of employment with Clay, Clay ceased granting rebates to Shreve which it continued to give to other dealers. This dispute arose from Robinson's employment with Clay while he owned and managed Shreve, and his demand that Shreve also receive the volume discounts despite Clay's stated policy of allowing no discount to Shreve while Robinson was employed with Clay. Shreve contests the denial of the discount only for the period from 1971-74.

Clay's pricing system for its dealers had two main fea-

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[1] The termination of the dealership resulted from a dispute not relevant to the resolution of the issues in this appeal.

[2] During oral argument it was stated that Robinson owned all 60 shares of Shreve until 1973, when he gave one share to a Shreve employee.

tures, the base price and the volume discount plan. The base price for a piece of equipment was the same for all dealers, determined by deducting 30% from Clay's published price list for its equipment. Clay also offered its dealers an additional cash-payment discount of 2% for payments made within ten days.

Clay began offering a volume discount plan to all its dealers in 1964. The amount of the discount was determined by the amount of each dealer's cumulative annual purchases of Clay farm equipment. The discounts were granted according to a sliding scale: the more equipment a dealer purchased during the year, the higher the percentage of discount it received at the end of that year. In actual practice the maximum discount Clay's largest dealers received was approximately 8%. Dealers receiving the discounts accordingly paid lower net prices for each item of farm equipment purchased from Clay during the discount year than they would have paid without the volume discount plan. The exact amount of the discount for each year could not be determined until the end of that year. Thus Clay dealers, when considering the discount in setting retail prices of Clay equipment during the year, at best could estimate the amount they might receive at the end of the year.

The district court found that Shreve competed directly with several Clay dealers who received the year-end volume discounts and rebates. Shreve's primary market area during 1971 through 1974 was found to be within a 50-mile radius of Shreve, Ohio. In addition, Shreve made isolated sales beyond the 50-mile radius. Three Clay dealers were located within Shreve's primary geographic market area and were found to compete directly with Shreve. Three more Clay dealers were located outside Shreve's primary geographic area but were found to have market areas which overlapped with Shreve's.

Each of these dealers sold one or more of the same lines of Clay equipment as sold by Shreve. Each sold Clay equipment on the retail level primarily to farmers. Each purchased Clay equipment reasonably close in time to Shreve's purchase of numerous items of identical Clay equipment. Each dealer, except Shreve, was eligible for year-end discounts and rebates of varying amounts, depending on total sales for the year.

For the four year period from 1971 through 1974 Shreve was qualified to receive a volume discount on the basis of its sales volume.[3] Based on the testimony of Shreve's economist, the district court found that the denial of the discount to Shreve substantially lessened Shreve's ability to compete with other Clay dealers for sales of Clay farm equipment. Although this finding was fraught with inconsistencies,[4] we shall assume without deciding that the district court's finding of reduced competition was correct. The court found that because of the denial of the discount Shreve had to forego additional purchases of Clay equipment, Shreve lost additional sales, and Shreve lost profits on those additional sales.

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[3] Shreve had total purchases from Clay for this period in the amount of $356,003.14. Yearly purchases were as follows: 1971–$63,045.85; 1972–$78,442.04; 1973–$74,447.95; 1974–$140,147.30. Based on the volume discount schedule, the estimated discounts Shreve would have received for these years were as follows: 1971–$4,304.58; 1972–$5,844.20; 1973–$5,444.79; 1974–$12,014.73. Shreve's size among Clay dealers on the basis of volume of equipment purchased from Clay was third in 1971, first in 1972, fourth in 1973, and second in 1974.

[4] Shreve's economist estimated that if not for the denial of the volume discount, Shreve would have made *additional* purchases of Clay equipment in the amount of $518,858, more than Shreve's actual total purchases from Clay for the same period. The estimated amount of additional sales lost because of the denial of the discount was greater than Shreve's actual total sales of Clay equipment for 1971-74. The estimated percentage of net profit on these lost sales was greater than Shreve's actual net profit percentage for any year of its operation.

II

In 1966 Robert Robinson, the president, manager, and sole shareholder of Shreve, accepted employment with Clay as its territorial manager. Shortly thereafter a dispute arose between Robinson and Clay over whether Clay had advised Robinson that Shreve would be ineligible for the volume discount while Robinson was employed with Clay. Because of this dispute, Robinson's employment contract with Clay for 1967 added a condition that Robinson's acceptance of employment would prevent Shreve from receiving the volume discount. Robinson voluntarily signed this contract. Although subsequent employment contracts did not contain this prohibition against Shreve's receipt of a discount, the record shows that in the course of dealings between the parties Robinson clearly understood each time he renewed his contract with Clay that Shreve would not receive the discount. Clay stated its reason for this policy was to minimize the incentive of a dealer also acting as a territorial manager to promote his own business at the expense of other competing dealers in the territory.

For Robinson's work as a territorial manager Clay paid him a salary and commissions on all purchases made by all Clay dealers (including Shreve) in his territory, reimbursed his travel expenses, and provided him with a company car. Robinson's rate of commission ranged from 3.5% to 6.0%, depending on the volume of sales in his territory.[5] The record indicates that for 1971 through

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[5] From 1971 through July 1973, Robinson's commission was 3.5%, with an additional 2.5%, or a total of 6%, on all volume purchased over $225,000. This 2.5% incentive commission for volume over $225,000 was void if Shreve's volume of purchases exceeded 25% of the total volume produced in the territory. After July, 1973, Robinson received 4% on volume up to $100,000, and 6% on all volume over $100,000, with no limitation on Shreve's volume to obtain the full commission.

1974 the approximate total compensation Clay paid Robinson as territorial manager was $16,000 in salary and $41,000 in commissions.

According to Robinson's own testimony, his duties as Clay's territorial manager and as the owner and manager of Shreve substantially overlapped. In addition to managing Shreve while employed with Clay, Robinson made approximately one-half of all the sales of Clay equipment by Shreve from 1971 through 1974. Robinson, as virtually the sole shareholder, received no salary or compensation from Shreve for his services. Robinson testified that while employed for Clay he also conducted business for Shreve when visting farmers in his capacity as Clay's territorial manager.

In 1973 Clay agreed to grant the volume discount to Shreve for the 1974 discount year because Robinson's son was to begin managing Shreve and Robinson then would work full-time for Clay. Shreve did not receive the discount in 1974 because of its failure to meet other requirements. Clay had a long-standing policy that a dealer must keep his account with Clay current throughout the relevant discount year in order to receive the discount. The condition was made known and uniformly applied by Clay to all dealers. The district court found that Shreve failed to keep its account with Clay current in the 1974 discount year.

III

A private plaintiff may not recover treble damages under § 4 of the Clayton Act, 15 U.S.C. § 15, by proving nothing more than a violation of the anitrust laws. *M. C. Manufacturing Co., Inc.* v. *Texas Foundries, Inc.*, 517 F.2d 1059, 1063 (5th Cir. 1975), *cert. den.*, 424 U.S. 968 (1976); *Rea* v. *Ford Motor Co.*, 497 F.2d 577, 589 (3rd Cir.),

cert. den., 419 U.S. 868 (1974); *McAlpine* v. *AAMCO Automatic Transmissions, Inc.*, 461 F. Supp. 1232, 1264 (E.D. Mich. 1978). "It is not enough that the public has been harmed by a violation of the antitrust laws" for a private plaintiff to recover treble damages. *Van Dyk Research Corp.* v. *Xerox Corp.*, 631 F.2d 251, 255 (3rd Cir. 1980). Nor does the fact that a plaintiff has suffered damage alone constitute liability under the antitrust laws. *Ace Beer Distributors, Inc.* v. *Kohn, Inc.*, 318 F.2d 283, 287 (6th Cir.) *cert. den.* 375 U.S. 922 (1963); *McAlpine, supra,* at 1264. To recover treble damages the plaintiff has the burden of proving a causal connection between the antitrust violation and the damages suffered. Various descriptions of this burden of proof require that the violation be a material cause of the injury, *Comfort Trane Air Conditioning* v. *Trane Co.*, 592 F.2d 1373, 1383 (5th Cir. 1979); or that the violation be a substantial factor in the occurrence of damage, *Commerce Tankers* v. *National Maritime Union of America*, 553 F.2d 793, 801 (2nd Cir.) *cert. den.* 434 U.S. 923 (1977); *Reibert* v. *Atlantic Richfield Co.*, 471 F.2d 727, 731 (10th Cir.) *cert. den.* 411 U.S. 938 (1973); or that the violation be the proximate cause of the damage. *M. C. Manufacturing Co., supra,* at 1064, *McAlpine, supra.* Although a plaintiff need not show that the defendant's wrongful actions were the sole proximate cause of his injuries, the causal link must be proved as a matter of fact and with a fair degree of certainty. *Comfort Trane Air Conditioning, supra; Response of Carolina, Inc.* v. *Leasco Response, Inc.*, 537 F.2d 1307, 1321 (5th Cir. 1976). "To be one of several causes is not enough." *Handgards, Inc.* v. *Ethicon, Inc.*, 601 F.2d 986, 997 (9th Cir. 1979) *cert. den.* 444 U.S. 1025 (1980). The evidence linking the violation to the injury sustained must be more precise than that needed to establish the amount of dam-

ages. *Van Dyk Research Corp., supra.* Accordingly, in determining whether Shreve may recover treble damages, the focus is not just on whether the volume discount plan violates the Robinson-Patman Act, or whether Shreve or other Clay dealers were injured, but whether the volume discount plan was a Robinson-Patman Act violation which was the proximate or material cause of Shreve's injury.

Where a purchaser does not take advantage of a lower price or a discount which is functionally available on an equal basis, it has been held that either no price discrimination has occurred, or the discrimination is not the proximate cause of the injury. *Sweeney & Sons, Inc.* v. *Texaco, Inc.,* 1980-81 Trade Cases ¶ 63,611, pp. 77,238-9 (3rd Cir. 1980); *FLM Collision Parts, Inc.* v. *Ford Motor Co.,* 543 F.2d 1019, 1024-5 (2nd Cir. 1976) *cert. den.* 429 U.S. 1097 (1977); *Tri-Valley Packing Association* v. *F.T.C.,* 329 F.2d 694, 703-4 (9th Cir. 1964); *Mowrey* v. *Standard Oil Co. of Ohio,* 463 F.Supp. 762, 775-76 n.17 (N.D. Ohio 1976) *aff. without opinion* 590 F.2d 335 (6th Cir. 1978); *World-Wide Volkswagen Corp.* v. *Autobahn Motors Co.,* 1980-81 Trade Cases ¶ 63,601, p. 77,197 (S.D. N.Y. 1980); *Interstate Cigar Co.* v. *Sterling Drug, Inc.,* 1980-2 Trade Cases ¶ 63,430, pp. 76,253-4 (S.D. N.Y. 1980); *Rod Baxter Imports* v. *Saab-Scania of America, Inc.,* 489 F.Supp. 245, 248 n.2 (D. Minn. 1980); *Beam* v. *Monsanto Company, Inc.,* 414 F.Supp. 570, 587 (W.D. Ark. 1976).[6]

In the present case, if Shreve had participated in the discount program, its discounts would have been among the largest granted by Clay, and the difference in discount of its nearest competitor insignificant. Shreve's participation in the program would have left it with no injury of which

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[6] See also ABA Antitrust Section, Monograph No. 4, The Robinson-Patman Act: Policy & Law Vol. I, pp. 107-16 (1980); Kintner, A Robinson-Patman Primer, pp. 198-200 (1970).

to complain. It was not the existence of the discount program which caused Shreve's alleged injury, but Robinson's choice of an employment relationship with Clay which caused the loss of the discount and Shreve's alleged injury. Although the discounts were available to Shreve, it did not take advantage of the discount program because of the benefits it received from Robinson's employment with Clay.

Shreve argues that Robinson's employment with Clay must be disregarded in considering Shreve's relationship with Clay and its eligibility for the discount. We cannot agree. The evidence is compelling that Robinson profited from his employment with Clay, thereby benefiting Shreve. Robinson was Shreve's sole stockholder, president, manager and main salesman. Shreve paid no salary to Robinson. Robinson's testimony demonstrated the benefits to Shreve from his employment with Clay not only through compensation paid to Robinson, but also through increased business and sales opportunities because of Robinson's overlapping roles. Consideration of Shreve's relationship with Clay is inseparable from Robinson's employment relationship with Clay for purposes of determining whether Shreve could recover antitrust treble damages. *See Bucyrus-Erie Co.* v. *General Products Corp.*, — F.2d — No. 79-3172 (6th Cir. Mar. 5, 1981).

We conclude that the district court erred in holding that the discount was unavailable to Shreve because "its availability is premised on burdensome conditions not imposed on all competing buyers," *i.e.*, the condition that Robinson quit Clay's employment. This "burdensome" condition was not imposed on all competing buyers because no other competing dealer was employed as a Clay territorial manager or benefited as Shreve did from Robinson's employment with Clay. Robinson voluntarily assumed this unique relationship with Clay, and during the years in

question knew his employment made Shreve ineligible for the discount. Robinson was under no compulsion to renew his employment contracts, and was free to quit Clay's employment anytime after giving 10 days notice. Thus *Fowler Manufacturing Company* v. *Gorlick,* 415 F.2d 1248 (9th Cir. 1969) *cert. den.* 396 U.S. 1012 (1970), relied on by the district court, is inapposite. Fowler rejected the seller's defense that other concessions or adjustments had been made to the buyer to compensate for the price discrimination. *Id.* at 1253-4. In *Fowler,* however, any concessions or adjustments to the buyer as compensation for the price discrimination were controlled exclusively by the seller. Here whether Shreve received the discount or continued to receive the benefits of Robinson's employment with Clay was controlled by Shreve.[7]

Because Robinson voluntarily accepted the employment relationship with Clay, *Perma Life Mufflers, Inc.* v. *International Parts,* 392 U.S. 134 (1968), is also inapplicable. There the plaintiffs had been compelled to accept the onerous terms of a franchise agreement as a condition of doing business with the franchisor. Here Clay did not compel Robinson and Shreve either to accept Robinson's employment with Clay or lose the Clay dealership, nor has Shreve alleged that Clay ever threatened to cancel its dealership agreement if Robinson did not work as Clay's territorial manager. Shreve's options were the benefits of Rob-

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[7] The fact that the *Fowler* decision may result in relieving a plaintiff of the need to prove a casual relationship between the price discrimination and the asserted injury has been questioned. *Chrysler Credit Corp.* v. *J. Truett Payne, Inc.,* 607 F.2d 1133, 1136 (5th Cir. 1980) *cert. granted* 101 S.Ct. 70 (1980); *Sweeney & Sons, Inc.* v. *Texaco, Inc.,* 478 F.Supp. 243, 273 (E.D. Penn. 1979) *aff'd* 1980-81 Trade Cases ¶ 63,611 (3rd Cir. 1980); Rez, "Causation and Automatic Damages in Secondary-Line Injury Cases Under § 2(a) of the Robinson-Patman Act: Is *Fowler* v. *Gorlick* Dead?" 55 Notre Dame L. 660 (1980).

inson's employment with Clay or the benefits of the volume discount plan. Its selection of either option had no effect on its retention of the Clay dealership.

Finally *Dayco Corp.*, 66 F.T.C. 451, *rev'd on other grounds* 362 F.2d 180 (6th Cir. 1966), cited by the district court, bears little resemblance to the unique facts of this case. *Dayco* rejected the argument that no price discrimination had occurred where lower prices were available to all "sub-jobbers" if they formed jobber groups. *Dayco* stated that lower prices are unavailable where a purchaser must alter his *purchasing* status before receiving them. In the present case Shreve did not have to alter its independent purchasing status to receive the discount, as was the case in *Dayco*. Clay offered Shreve special advantages through Robinson's employment with Clay which were unavailable to other Clay dealers. Shreve freely and knowingly chose those advantages. Shreve cannot claim now that the discount was unavailable because it had to alter its relationship with Clay and assume the same independent relationship with Clay as all other Clay dealers eligible for the discount. The discount was functionally available to Shreve but it chose not to take advantage of the discount plan. Therefore, the discount plan was not the proximate cause of any alleged injury suffered by Shreve.

Furthermore, when examined in the context of an employment relationship, Clay's condition to Robinson's employment that Shreve would be ineligible for the discount was not an inflexible, undue restraint for which Shreve could recover treble damages. While Robinson was under no compulsion to accept Clay's terms and conditions of employment, the evidence demonstrates that the employment contract and Shreve's eligibility were negotiable and in fact were changed in 1974. For that year Clay agreed to grant Shreve the discount because Robinson's son was to take over the management of Shreve and Robinson was

to devote his full time to being a Clay territorial manager. Under these circumstances where a voluntary employment relationship existed with negotiable terms of employment, Shreve may not recover antitrust damages for a condition of Robinson's employment which was accepted without coercion. See *Gross* v. *University of Tennessee,* 448 F. Supp. 245, 249 (W.D. Tenn. 1978) *aff'd* 620 F.2d 109 (6th Cir. 1980); *Chuy* v. *Philadelphia Eagles,* 407 F.Supp. 717, 727 (E.D. Penn. 1976).

The judgment of the district court granting damages to Shreve for 1971-73 is reversed. The judgment denying damages to Shreve in 1974 and other damages claimed by Shreve in its cross appeal is affirmed. The costs of this appeal are taxed against Shreve Equipment, Inc.

UNITED STATES COURT OF APPEALS
SIXTH CIRCUIT

CASE NOS. 79-3217 and 79-3218

SHREVE EQUIPMENT, INC.,
Plaintiff-Appellee, Cross-Appellant,

vs.

CLAY EQUIPMENT CORPORATION,
Defendant-Appellant, Cross-Appellee.

Before: MARTIN, Circuit Judge, PHILLIPS, Senior Circuit Judge, and CELEBREZZE, Senior Circuit Judge.

JUDGMENT

(Filed May 18, 1981)

This cause came on to be heard on the record from the United States District Court for the Northern District of Ohio and was argued by counsel. On consideration whereof it is now therefore Ordered and Adjudged by this Court that the Judgment of the said District Court granting damages to Shreve for 1971-1973 is reversed. The Judgment denying damages to Shreve in 1974 and other damages claimed by Shreve in its cross-appeal is affirmed. The costs of this appeal are taxed against Shreve Equipment, Inc.

BY ORDER OF THE COURT

/s/ JOHN P. HEHMAN
Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

CASE NO. C75-242A

SHREVE EQUIPMENT, INC.,
Plaintiff,

v.

CLAY EQUIPMENT CORPORATION,
Defendant.

Judge: JOHN M. MANOS.

MEMORANDUM OF OPINION

(Filed November 13, 1978)

In this case, the plaintiff, Shreve Equipment, Inc.,[1] alleges that the defendant, Clay Equipment Corporation,[2] violated section 2 (a) of the Robinson-Patman Act.[3] Plaintiff seeks treble damages under section 4 of the Clayton Act.[4] The alleged violation arises from a volume discount plan which allowed year-end rebates to Clay dealers on their purchases of products according to a sliding scale of discounts based upon the cumulative amount of each

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[1] Hereinafter "Shreve."

[2] Hereinafter "Clay."

[3] 15 U.S.C. § 13(a) (1970).

[4] 15 U.S.C. § 15 (1970).

dealer's purchases of Clay products in the particular discount year.

Findings of Fact

Shreve, an Ohio corporation, was engaged in the retail sale, installation, and servicing of farm equipment, including Clay equipment, at its principal place of business in Shreve, Ohio from 1962 until it was terminated as a dealer by Clay in 1975.[5]

Clay is a farm equipment manufacturer; it sells its product to dealers in interstate commerce for resale in the United States.[6] During the years at issue in this case, 1971 through 1974, Clay manufactured and sold farm equipment in three product lines: the heavy equipment line, the farm building products line, and the "Morton" line of grain-handling products.[7] Shreve was a dealer for Clay's heavy equipment and farm building products line during the years 1971 through 1974, but it also occasionally dealt in some of Clay's Morton line.[8]

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[5] Transcript of Trial Proceedings (hereinafter Tr.) 12, 14-15, 16-17, 20.

[6] Tr. 5.

[7] Tr. 688-89. Clay's heavy equipment line included farm equipment such as milking parlors, manure handling equipment, silo unloaders, mechanical feeders, and industrial truck-mounted tanks. The farm building products line included stalls, stanchions, livestock pens, gates, water bowls, fans, vents, ventilators, windows, doors, drains, hog equipment, and motors and switches. The Morton line included grain elevators, bins, mills, and mill buildings. Plaintiff's Exhibit 4, Supplemental Answer 2. The various items of farm equipment manufactured and sold by Clay were available only in a single grade and quality although a product may be available in numerous sizes and with several optional features. Plaintiff's Exhibit 4, Supplemental Answer 5. Tr. 692-94.

[8] Tr. 18, 688-90.

Shreve's primary geographic market area during 1971 through 1974 was within a 50-mile radius of Shreve, Ohio,[9] but Shreve introduced evidence to establish that its market area extended beyond that 50-mile radius.[10] Shreve made sales of Clay equipment throughout much of Ohio[11] and some in other states.[12]

Shreve was in competition with Clay dealers whose businesses were located within Shreve's primary geographic market area, as well as with Clay dealers located outside Shreve's primary geographic market area but whose area overlapped Shreve's.[13] The Clay dealers operating within Shreve's primary geographic market area were Curry Lumber of Wooster, Reber Construction of Apple Creek, and W. A. Vanasdale, Inc. of Shelby.[14] A number of other Clay dealers were located outside Shreve's primary geographic area yet their primary geographic market areas (as defined by a 50-mile radius) overlapped Shreve's market area. These included John Ocel of Mechanicstown, Larcom & Mitchell of Delaware, Ohio, and Union County Farm Bureau of Marysville.[15] Shreve also competed with dealers

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[9] Tr. 359-63, 526-29, Plaintiff's Exhibit 72. Shreve's primary market area during 1971 through 1974 included Wayne, Ashland, Holmes, Tuscarawas, Knox, Medina, and Lorain counties of Ohio. Tr. 26, 359-63, Plaintiff's Exhibit 72.

[10] Tr. 359-65.

[11] Tr. 23-26, 168, 361, Plaintiff's Exhibit 72.

[12] Tr. 26-27. Shreve sold Clay farm equipment in Michigan, Indiana, Kentucky, Texas, and West Virginia. *Id.*

[13] Tr. 363-65.

[14] Tr. 79, 88, 93-94, 363-64. Reber Construction began operations in 1973 in Apple Creek and moved to Wooster in 1974. Both locations are within the 50-mile radius. Tr. 94

[15] Tr. 96-97, 101-03; *see* Plaintiff's Exhibit 73.

located beyond the area where a geographic market area defined by a 50-mile radius would overlap with Shreve's primary geographic market area. For example, there is evidence that Shreve competed with Wayne Bambauer of New Knoxville, Ohio[16] whose primary geographic area does not overlap Shreve's primary geographic area. Thus, during 1971 through 1974 Shreve competed with at least Curry Lumber, Reber Construction, W. A. Vanasdale, John Ocel, Larcom & Mitchell, Union County Farm Bureau, and Wayne Bambauer.[17] Each of these dealers sold one or more of the same lines of Clay farm equipment as were sold by Shreve,[18] and each, like Shreve, was engaged in the retail sales of Clay equipment primarily to farmers during 1971 through 1974.[19]

Shreve demonstrated that its most direct competitor was W. A. Vanasdale. Vanasdale was located approximately 35 miles from Shreve and sold Clay's heavy equipment, farm building products, and Morton lines.[20] For the years 1971 and 1972, $79,643 or 49.9% of the total amount of Clay products purchased by Shreve were identical to those purchased by Vanasdale, and $47,850 or 62.1% of the total amount of Clay products purchased by Vanasdale were identical to those purchased by Shreve.[21] For the

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[16] Tr. 106-08, 251-52, 364-65.

[17] Tr. 78-79, 81-84, 86, 88, 90-104, 106-08, 237-42, 251-52, 261, 264-66, 285-86, 362-65.

[18] Tr. 80, 89, 94, 98, 101, 103, 107, 236, 250, 261-62, 374-79; *see* Plaintiff's Exhibits 74, 75, 80-83.

[19] Tr. 16-17, 80-81, 89-90, 95, 98, 102-03, 107, 241, 254-55, 262.

[20] Tr. 88-89, 261-62. Shreve also sold Clay's heavy equipment line and farm building products line and, at some time, some of the Morton line. *See* text accompanying note 8, *supra*.

[21] Tr. 374-75; Plaintiff's Exhibits 74 and 80.

years 1973 and 1974, $152,370 or 65.2% of the total amount of Clay products purchased by Shreve were identical to those purchased by Vanasdale, and $85,175 or 51.2% of the total dollar amount of Clay products purchased by Vanasdale were identical to those purchased by Shreve.[22] Both Shreve and Vanasdale sold primarily to farmers in the same product market during 1971 through 1974.[23] They were competitors during that period.[24]

The prices charged to Clay equipment dealers were determined as follows. The base price which Clay charged its dealers for an identical item of Clay farm equipment was the same for all dealers;[25] it was determined by deducting a standard dealer's discount of 30% from Clay's published list price for each item of equipment.[26]. Also, Clay gave its dealers an additional cash-payment discount of 2% if payment was made within ten days.[27] In addition, Clay had a volume discount plan which provided year-end volume discounts or rebates to Clay dealers on their purchases of farm equipment.[28] The amounts of volume discount that Clay allowed its dealers during the discount year were determined by the amount of each dealer's cumu-

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[22] Tr. 375-76; Plaintiff's Exhibits 75 and 81.

[23] Tr. 90-92, 261-62, 264-67.

[24] *See* Tr. 380-81, 388.

[25] Tr. 6.

[26] Tr. 48, 638-39.

[27] Tr. 48, 670-71, 709.

[28] Tr. 6, 48, 641-43; Plaintiff's Exhibits 31-34. Clay began the volume discount program in 1964. It was in effect throughout the years in question in this case: 1971 through 1974.

lative annual purchases of Clay farm equipment.[29] This volume discount plan, in effect during the years 1971 through 1974, allowed significant amounts of volume discounts to eligible dealers.[30] In order to determine the actual net price paid by Clay dealers for the farm equipment they purchased, the amount of the volume discount received by the dealer during the year in which the purchases were made must be taken into account.[31]

From 1967 to 1975, Clay denied Shreve its volume discounts on purchases of farm equipment for one reason or another.[32] In the years 1971 through 1973, Clay denied its volume discounts to Shreve because Robert Robinson, Shreve's president, was employed by Clay as a Territory Manager.[33]

For the year 1974, Clay denied Shreve a volume discount because Shreve's account had been past due during that discount year.[34]

In the 1971 through 1974 period, Clay granted its volume discounts to Clay dealers in competition with

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[29] For the years 1971 through 1974 the volume discount schedule was as follows:

Dealer Net Annual Purchases	Volume Discount
$10,000.00-	$ 200
$10,000.00-$19,999.99	$ 200 plus 2% of amount over $10,000.00
$20,000.00-$29,999.99	$ 600 plus 4% of amount over $20,000.00
$30,000.00-$39,999.99	$1,200 plus 6% of amount over $30,000.00
$40,000.00-$49,999.99	$2,000 plus 8% of amount over $40,000.00
$50,000.00 and over	$3,000 plus 10% of amount over $50,000.00

Plaintiff's Exhibits 31-34.

[30] Tr. 392-97.

[31] Tr. 395-99.

[32] Tr. 51-52, 646.

[33] Tr. 58-59, 221-22, 646-47, 755.

[34] Tr. 62-63, 647-48, 724-25.

Shreve. These included Curry Lumber, Reber Construction, W. A. Vanasdale, John Ocel, Larcom & Mitchell, Union County Farm Bureau, and Wayne Bambauer.[35] Because Clay denied its volume discounts to Shreve, Shreve paid significantly and substantially higher net prices for each item of farm equipment it purchased from Clay in the years 1971 through 1974 than were paid by competing Clay dealers such as Bambauer, Curry, and Vanasdale.[36]

The evidence demonstrates that Shreve purchased numerous items of Clay equipment reasonably close in time to the time in which competing Clay dealers purchased identical equipment.[37]

The price discrimination resulting from Clay's denial of its volume discount to Shreve in 1971 through 1974 resulted in significant competitive injury. The manufacture of farm equipment is concentrated among a relatively

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[35] Plaintiff's Exhibit 5, pp. 4-11, Plaintiff's Exhibits 39-42.

[36] During the years 1971 through 1974, when Shreve received no volume discount, Bambauer, Curry, and Vanasdale received volume discounts on their purchases of Clay farm equipment which resulted in the effective percentage rates of discounts as indicated:

	Dealer	Purchases	$ Volume Discount	% Volume Discount
1971:	Bambauer	$ 74,895.75	$5,489.57	7.33
	Curry	24,632.52	785.30	3.187
	Vanasdale	63,208.48	4,320.85	6.836
1972:	Bambauer	74,249.27	5,424.93	7.31
	Curry	14,955.85	299.12	2.0
	Vanasdale	38,281.86	1,696.91	4.43
1973:	Bambauer	94,769.44	7,476.94	7.89
	Curry	25,184.95	807.40	3.2
	Vanasdale	111,591.96	9,159.20	8.21
1974:	Bambauer	119,837.16	9,983.72	8.33
	Curry	40,629.96	2,050.40	5.05
	Vanasdale	53,051.16	3,305.12	6.23

Plaintiff's Exhibits 5, 39-42, Tr. 397-98, 407-09.

[37] Tr. 43-48, 122-26, 397-98, 407-13, Plaintiff's Exhibits 15-30.

small number of manufacturers nationally.[38] Under circumstances in which sales of a product are concentrated among a few manufacturers' brands, competition among retail dealers of a particular brand, intra-brand competition, becomes most important if effective competition is to exist within the industry.[39] Thus, intra-brand competition is important for effective competition in the retail farm equipment industry and any impediment to intrabrand competition tends to be an impediment to competition generally.[40]

During the years 1971 through 1974, price was a major factor between Shreve and its competitors.[41] However, non-price factors also affected competition among the dealers.[42] Clay's denial of its volume discount to Shreve, while granting the volume discount to competing Clay dealers, substantially impaired the ability of Shreve to compete with those competitors receiving the volume discount.[43] Shreve, as well as other Clay dealers which were denied the volume discount or received only small volume discounts, experienced slower sales growth than those which received the volume discount.[44] Further, Clay dealers in Ohio which were denied the volume discount had a higher failure rate than those which received the

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[38] Tr. 335-37, 339-42, 347-48, Plaintiff's Exhibits 69, 70.

[39] Tr. 320-21, 381-83, 386-87.

[40] Tr. 381-86.

[41] Tr. 126-29, 237-38, 252-53, 263, 288, 353-54, 582-83.

[42] Tr. 237-38, 252-53, 263, 355-56, 402-03.

[43] Tr. 128-31, 395-97, 398-406, 413-24, 463-68, Plaintiff's Exhibits 87-89, 98-100.

[44] Tr. 130, 422-24, 432-34, 462-66, Plaintiff's Exhibits 93-96.

discount.[45] Thus, Clay's volume discount plan and its denial of its volume discount to Shreve and other dealers (and the granting of only small volume discounts to some) while granting large volume discounts to competing dealers substantially lessened competition among the dealers for sales of Clay farm equipment to farmers.

In the four-year period from 1971 through 1974, Shreve purchased $356,083.14 in farm equipment from Clay.[46] Shreve was denied the volume discount in each of those years[47] even though, on the basis of sales volume, Shreve would qualify for participation in the program.[48] The volume discounts denied Shreve during this period were as follows: $4,304.58 in 1971, $5,844.20 in 1972, $5,444.79 in 1973, and $12,014.73 in 1974.[49]

The denial of the volume discount to Shreve substantially lessened Shreve's ability to compete with other Clay dealers for sales of Clay farm equipment. Shreve lost substantial sales as a result of the denial of the volume discount.[50] The amount of purchases Shreve would have made from Clay but did not because of lost sales due

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[45] Tr. 414-19, Plaintiff's Exhibits 87-89. Similarly, those Clay dealers that only occasionally received Clay's volume discount, or received only a small volume discount also had a high failure rate. *Id.* Also, the level of concentration of sales of Clay equipment increased significantly both nationally and in Ohio among Clay dealers which received the volume discount. Tr. 419-22.

[46] Shreve made net purchases of farm equipment from Clay in interstate commerce in the amounts of $63,045.85 in 1971, $78,442.04 in 1972, $74,447.95 in 1973, and $140,147.30 in 1974. Plaintiff's Exhibit 1, ¶ 8.

[47] Plaintiff's Exhibit 1, ¶ 9.

[48] Tr. 133, 477-78, Plaintiff's Exhibit 104.

[49] *See* notes 46 and 29 *supra; see also* Plaintiff's Exhibit 104, column 1 plus column 2, Stipulation of the Parties, Tr. 133, *and see* Tr. 477-79.

[50] *See, e.g.* Tr. 81-86, 90-92, 95-96, 98-100, 102-04, 107-08, 131-32, 238-40, 251-52, 264-67, 285, *see also* Tr. 462-76.

directly to the denial of the volume discount was calculated by Dr. Marion, the plaintiff's expert witness, to be $519,858.[51] Dr. Marion calculated that Shreve's lost sales to its customers during 1971 through 1974 amounted to $622,584.[52] Shreve's lost profits on those sales during 1971 through 1974 were calculated to be $78,930.[53] Thus the amount of lost profits on lost sales during 1971 through 1974 was calculated to be $19,732.[54]

During the years 1971 through 1974, Shreve's president and major shareholder, Robert L. Robinson, served as a Territory Manager for Clay in the northeast section of Ohio. Clay hired Robinson in May, 1966 with full knowledge of his executive position with Shreve.[55] When Clay hired Robinson it agreed that Robinson could continue to operate Shreve notwithstanding his employment with Clay as territorial manager.[56]

Clay did not inform Robinson when he was hired that Shreve would be denied the volume discount because he was their territorial manager. It was after Robinson had worked for Clay for six months that he was first informed that Shreve would be denied the volume discount because Robinson was a territorial manager and at the same time president of Shreve.[57] The 1966 employment contract

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[51] Plaintiff's Exhibit 103.

[52] Plaintiff's Exhibit 105.

[53] *Id.*

[54] *Id.* *See* note 125 *infra.*

[55] Tr. 27, 52-56, *see* Plaintiff's Exhibit 35.

[56] Tr. 30, 53-55.

[57] Tr. 54-57. Clay informed Robinson that Shreve would not receive the 1966 volume discount at the time the 1966 volume discount was due. Robinson objected, and Clay eventually paid part of the 1966 volume discount to Shreve. Tr. 57-58.

between Clay and Robinson did not incorporate any provision denying Shreve its volume discount,[58] but such a provision was inserted in the 1967 employment contract.[59] However, the 1967 contract was the only employment contract to include the provision denying the volume discount to Shreve; no later contracts provided that Shreve would be ineligible for it.[60] Denial of the volume discount to Shreve became a continuous dispute between Clay and Robinson.[61]

Robinson fully performed the services required of him under his employment contract with Clay.[62] It does not appear that Robinson used his position as Territory Manager to gain competitive advantage for Shreve over other Clay dealers in Robinson's territory.[63] Robinson directed sales leads to the Clay dealer that was geographically closest to the customer.[64] Robinson successfully established new Clay dealerships in his territory during his tenure as a Clay Territory Manager.[65]

In the spring of 1973, Clay's General Sales Manager, Charles Chamness, told Robinson that Clay would grant its volume discount to Shreve in the 1974 discount year because Robinson's son, upon graduating from college, would manage Shreve which would thereby free Robinson

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[58] *See* Plaintiff's Exhibit 8.

[59] Tr. 58, Plaintiff's Exhibit 9.

[60] Tr. 58, *see* Plaintiff's Exhibits 9-14.

[61] Tr. 58-59, 220-24.

[62] Tr. 30-32.

[63] Tr. 142, 208-11, 229-30, 240, 268, 272, *see* Tr. 678.

[64] Tr. 142-43, 272.

[65] Tr. 142, 208, 210-11. Robinson established 15 new Clay dealerships in his territory during his entire tenure and four new Clay dealerships during the 1971 through 1974 period. *Id.*

to serve Clay on a full-time basis.[66] However, Shreve did not receive the volume discount in 1974. Clay denied its volume discount to Shreve in 1974 on the ground that Shreve's account with Clay was past due at various times during the discount year.[67] It was a precondition for the receipt of the volume discount that the dealer must keep his account with Clay current throughout the relevant discount year.[68] This condition was printed on the literature distributed to Clay equipment dealers announcing the volume discount program[69] and Clay applied the condition to all dealers uniformly.[70] Although Shreve contends that its account was current in 1974, the court finds that Shreve failed to keep its account with Clay current in that year.[71]

Conclusions of Law

Illegal price discrimination in violation of section 2 (a) of the Robinson-Patman Act results when:

> any person engaged in commerce, in the course of

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[66] Tr. 60-61, 701-02.

[67] Tr. 62-63, 646-48.

[68] Tr. 645.

[69] *See* Plaintiff's Exhibits 31-34. Plaintiff's Exhibit 34 announces the 1974 volume discount program. *See* Tr. 643-44.

[70] *See* Tr. 729-34, 754-55.

[71] Tr. 712-29; Defendant's Exhibits P3, Q3, S3, B4 and E4; *see* Defendant's Exhibits F4, G4, H4, I4, and L4.

Clay's credit manager, Donald Rohwedder, described Clay's system of keeping accounts at trial. He had repeatedly checked the account and on each occasion he found the Shreve account had been substantially past due on several occasions in 1974. Tr. 723-29; Defendant's Exhibits G4 through I4 and L4.

> such commerce, either directly or indirectly, [discriminates] in price between different purchasers of commodities of like grade and quality, where either or any of the purchases involved in such discrimination are in commerce, where such commodities are sold for use, consumption, or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, and where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them. . . .[72]

The court holds that the defendants violated the Robinson-Patman Act in 1971, 1972 and 1973 and that Shreve was damaged. The court further holds that Shreve cannot recover any damages for the denial of the volume discount in 1974.

I. THE 1971 THROUGH 1973 PERIOD

There was price discrimination in the three-year period from 1971 through 1973 because Clay (1) charged Shreve higher net prices than it charged (2) competing Clay dealers (3) for farm equipment of like grade and quality (4) which it sold to competing dealers in contemporaneous transactions (5) in interstate commerce (6) for resale in the United States. The price discrimination had the effect of substantially lessening competition between Shreve and competing Clay dealers and Shreve was damaged in the 1971 through 1973 period by the price discrimination.

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[72] 15 U.S.C. § 13(a) (1970).

A. Price Discrimination

1. Difference in Price

There must be a difference in the prices charged to competing buyers if a violation of section 2(a) of the Robinson-Patman Act is to occur. *FTC* v. *Anheuser-Busch, Inc.*,[73] *FTC* v. *Morton Salt Co.*[74] Volume discount programs, like that used by Clay have been repeatedly found to violate the Robinson-Patman Act. *FTC* v. *Morton Salt Co.*,[75] *United Biscuit Co.* v. *FTC*,[76] *Standard Motor Products, Inc.* v. *FTC*,[77] *Moog Industries, Inc.* v. *FTC*,[78] *Bruce's Juices, Inc.* v. *American Can Co.*[79] In this case, Clay totally denied volume discounts to Shreve during the years 1971 through 1973.[80] As a result, Shreve paid higher prices for Clay farm equipment than were paid by other Clay dealers.[81] Thus Shreve was charged higher net prices than other dealers in 1971 through 1973.

2. Shreve's Competitors

To constitute a violation of section 2(a) of the Robin-

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[73] 363 U.S. 536, 549 (1960).

[74] 334 U.S. 37 (1948).

[75] *Id.*

[76] 350 F.2d 615 (7th Cir. 1965), *cert. denied*, 383 U.S. 928 (1966).

[77] 265 F.2d 674 (2d Cir.), *cert denied*, 361 U.S. 826 (1959).

[78] 238 F.2d 43 (8th Cir. 1956), *aff'd per curiam*, 355 U.S. 411 (1958).

[79] 87 F. Supp. 985 (S.D. Fla. 1949), *aff'd*, 187 F.2d 919 (5th Cir. 1951), *appeal dismissed*, 342 U.S. 875 (1951).

[80] *See* text accompanying notes 28-32, 35-36 *supra*.

[81] See text accompanying notes 31, 36 *supra*. The volume discounts paid to Shreve's competitiors represented the amount of price differential paid by Shreve.

son-Patman Act, the price discrimination must occur in comparable transactions in which the purchasers receiving the different prices are engaged in actual, functional competition with one another. *M. C. Manufacturing Co.* v. *Texas Foundries, Inc.*[82] Shreve and other Clay dealers sold the same Clay products in the same geographic area at the same functional level of retail sales of farm equipment to farmers in the 1971 through 1973 period.[83] Some of Shreve's competitors received the volume discount in part of or during all of the three-year period.[84]

3. Like Grade and Quality

"Before discrimination in the sale of commodities becomes actionable under section 2(a), it must be demonstrated that the products involved in the alleged price differentiation are of like grade and quality."[85] The plaintiff proved this element of the violation. Clay manufactured and sold only a single grade of farm equipment.[86] At trial, Shreve offered proof of many instances in which Shreve and competing dealers purchased identical items of Clay equipment[87] in the same period. Most specifically, Shreve proved that it purchased a substantial amount of identical items of Clay farm equipment as its competitor, Vanasdale, purchased.[88]

Moreover, Clay applied its volume discount plan to a dealer's total cumulative annual purchases without regard

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[82] 517 F.2d 1059, 1066 (5th Cir. 1975), *cert. denied*, 424 U.S. 968 (1976).

[83] *See* text accompanying notes 9-24 *supra*.

[84] *See* note 36 *supra* and text accompanying notes 35-36 *supra*.

[85] *E. Kintner, A Robinson-Patman Primer* 50 (1970).

[86] *See* note 7 *supra*.

[87] *See* text accompanying note 37 *supra*.

[88] *See* text accompanying notes 20-22 *supra*.

to the specific items purchased. Under such circumstances, it would have been unnecessary for Shreve to make an item-by-item comparison. On this point, the Eighth Circuit said in *Moog Industries, Inc.* v. *FTC*:[89]

> "The 'like grade and quality' concept * * * was designed to serve as one of the necessary rough guides for separating out those commercial transactions insufficiently comparable for price regulation by the statute", and while leaf springs, coil springs or piston rings may not be interchangeable and usable in all makes, models and ages of automobiles, we believe that when such items are sold to competitors in lines, . . . and when, as here, a discriminatory rebate is paid upon all items in a line, the Commission may properly find that such items are "sufficiently comparable for price regulation by the statute."
>
> . . . the question here is not related to uniform different prices for different items, nor, hence, to the like grade and quality concept, because the price discriminations here did not arise from uniform different prices for particular items, but, rather, they arose solely from the cumulative annual rebate plan, which applied to the aggregate dollar volume of all sales in a particular line to a particular purchaser in the preceding year, and, therefore, necessarily discriminated in price as to all items in the line, whether exactly alike and interchangeable or not.
>
> While all purchasers did not handle all three of petitioner's complete lines, some of them did, and numerous ones handled two of the lines; and it was shown and found that two or more of petitioner's purchasers did business in each trade area and were, consequently, competitors therein. Through operation of the applicable cumulative annual rebate schedule,

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[89] 238 F.2d 43 (8th Cir. 1956), *aff'd per curiam*, 355 U.S. 411. (1958).

> some were charged higher prices than others. This constitutes an adequate evidentiary basis to support the Commission's finding that price discriminations may substantially injure competition.[90]

For the above reason, as well as the specific item-by-item comparison of products purchased by Shreve and its competitors, the court holds that Shreve has established that the products involved are of like grade and quality.

4. Contemporaneous Sales

Section 2 (a) of the Act is violated only if the sales are reasonably close in time because "by definition, a discrimination means that the disparity in price or promotional payments must arise out of similar transactions under comparable circumstances."[91] The character of the particular product and the custom of the relevant market are decisive considerations in determining the contemporaneousness of the sales in a particular case.[92] As stated by one commentator:

> [T]he question of whether two sales are sufficiently separated to be nondiscriminatory can be answered only by reference to the particular facts and circumstances in each case. If the products are expensive, such as hydroelectric generators, which are sold relatively infrequently, then a time differential of a year or more between the sales may be necessary in order to avoid a violation of the act . . . . On the other hand, sales of items whose price structures are more susceptible to the vicissitudes of supply and demand — those

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[90] Id. at 49-50.

[91] *E. Kintner, supra* note 85 at 43; *see F. Rowe, Price Discrimination Under the Robinson-Patman Act* § 4.2 (1962).

[92] *F. Rowe, supra* note 91 at 50.

> that trade in high volume, are perishable or periodically modified, or are subject to technical obsolescence — must be relatively close together in order to be regarded as contemporaneous.[93]

The farm equipment products in this case are relatively expensive, infrequently purchased, and not subject to numerous model changes. This indicates that a wider definition of "contemporaneousness" is appropriate in this case. In addition, Clay itself treated all purchases of its equipment within a particular discount year as contemporaneous for purposes of its volume discount plans. Finally, an examination of the invoices for the particular transactions presented by the plaintiff at trial demonstrates many purchases by Shreve and competing Clay dealers of identical items of Clay equipment within one or two months of each other.[94]

Given the nature of the product and the market in this case, the court holds that Shreve has proved that the price differentials were charged on contemporaneous sales.

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[93] *E. Kintner, supra* note 85 at 45-46.

[94] Clay argues that Shreve's matching of items purchased by Shreve and its competitors fails to show contemporaneous sales since Shreve relied on the invoice date as the date of the sales transaction in order to make its comparison of sales. However, the consistent use of the invoice dates provides a valid comparison of sales. Clay itself treated the sales as occurring on the invoice date. Clay's credit manager testified that after the invoices were mailed to the dealers the transactions for that day were entered in the sales journal by computer and that the sales journal consists of a printout showing all invoices billed during a particular time period. *See* Tr. 708-39. The credit manager stated that the sales journal reflected Clay's sales. Tr. 739. Moreover, a review of Plaintiff's Exhibits 15 through 30 illustrates that there is little significant difference between the order date, the shipping date, and the invoice date. When dealing with infrequently-purchased, relatively expensive items such as Clay equipment, the court is able to compare sales over a longer range of time than when dealing with smaller, high-volume, perishable or periodically modified items.

5. Interstate Commerce

The parties have stipulated that Clay sold and distributed its products in interstate commerce.[95]

6. Resale in the United States

The parties have also stipulated that these goods were sold for resale in the United States.[96]

B. The Effect on Competition

Section 2(a) prohibits only those price discriminations the effect of which "may be substantially to lessen competition . . . in any line of commerce. . . ."[97] See *Morton Salt Co.* v. *FTC.*[98] Shreve need not prove actual adverse effect on competition, but must prove a reasonable possibility that the effect of Clay's denial of the volume discount may be substantially to lessen competition.

In *Morton Salt,* the Supreme Court stated:

> It would greatly handicap effective enforcement of the Act to require testimony to show that which we believe to be self-evident, namely, that there is a "rea-

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[95] Tr. 5, *see* text accompanying note 6 *supra.*

[96] Tr. 5-6, *see* text accompanying note 6 *supra.*

[97] 15 U.S.C. § 13(a) (1970). The statute is cited more fully in the text accompanying note 74 *supra.*

[98] 334 U.S. 37, 46 (1948). In *Morton Salt,* the Supreme Court considered the competitive injury that must be shown in a secondary line case in order for the price discrimination to constitute a violation of section 2(a). "The statute requires no more than that the effect of the prohibited price discriminations 'may be substantially to lessen competition . . . or to injure, destroy, or prevent competition." *Id.* The court emphasized this point by quoting from its opinion in *Corn Products Co.* v. *FTC,* 324 U.S. 726, 742 (1945), that " 'the statute does not require that the discrimination must in fact have harmed competition, but only that there is a reasonable possibility that they "may" have such an effect.' " 334 U.S. at 46.

> sonable possibility" that competition may be adversely affected by a practice under which manufacturers and producers sell their goods to some customers substantially cheaper than they sell like goods to the competitors of these customers.[99]

And in *Bargain Car Wash, Inc.* v. *Standard Oil Co.*[100] the Seventh Circuit stated:

> While the bare existence of price differentials does not compel an inference of a substantial lessening of competition, the cases go far in that direction. For example, a "substantial" price differential sufficient to "influence retail prices" has been held quite adequate. FTC v. Morton Salt Co., 334 U.S. 37, 49, 68 S. Ct. 822, 92 L. Ed. 1196 (1948); and a price differential without more but in the context of keen competition and tight profit margins furnishes sufficient basis for the conclusion that the requirement of Section 2(a) are present. E. Edelmann & Company v. FTC, 239 F.2d 152, 154 (7th Cir. 1956). Indeed, this Circuit has gone even further holding that "any substantial, sustained [price] differential between competing resellers is *prima facie* injurious." National Dairy Products Corp. v. FTC, 395 F.2d 517, 521 (7th Cir. 1968).[101]

In this case, however, the court need not depend upon the price difference alone to find competitive injury because Shreve has established by a preponderance of the evidence that Clay's volume discount plan actually results in a substantial lessening of competition between Shreve and its competitors.[102] The court's conclusion that co

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[99] 334 U.S. at 50.

[100] 466 F.2d 1163 (7th Cir. 1972).

[101] *Id.* at 1174 (brackets in original).

[102] *See* text accompanying notes 38-45 *supra*. Dr. Bruce Ma Shreve's expert witness, testified to the competitive harm based u

petition was injured is not affected by Shreve's ability to continue in business and show a profit in the 1971 through 1973 period despite Clay's price discrimination against it. It is possible to show competitive injury even though the sales of the party discriminated against expand and the business suffering the injury continues to show a profit. As stated by the Supreme Court in *Utah Pie Co.* v. *Continental Baking Co.*[103]:

> [T]he Court of Appeals placed heavy emphasis on the fact that Utah Pie constantly increased its sales volume and continued to make a profit. But we disagree with its apparent view that there is no reasonably possible injury to competition as long as the volume of sales in a particular market is expanding and at least some of the competitors in the market continue to operate at a profit. . . . We believe that the Act reaches price discrimination that erodes competition as much as it does price discrimination that is intended to have immediate destructive impact.[104]

Thus, the court holds that Clay's price discrimination substantially lessened competition and that Clay has violated section 2 (a) of the Robinson-Patman Act.

C. Clay's Defense in the 1971 through 1973 Period

Clay denied the volume discount to Shreve in 1971 through 1973 because Robert L. Robinson, the president of Shreve, was employed as a Territory Manager for Clay. The court holds that this does not justify an otherwise illegal price discrimination; Clay's attempted justification

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his analysis and evaluation of the farm equipment business generally and Shreve and its market area specifically.

[103] 386 U.S. 685 (1967).

[104] *Id.* at 702-03.

for price discrimination in 1971 through 1973 is not a legally adequate reason to treat Shreve differently than competing Clay dealers were treated.

Although there is no violation of section 2(a) if the lower price is functionally available to all purchasers on an equal basis, *FLM Collision Parts, Inc.* v. *Ford Motor Co.*;[105] see *FTC* v. *Morton Salt Co.*,[106] in this case the lower price was not functionally available to Shreve in 1971 through 1973. The lower price is not functionally available when its availability is premised on burdensome conditions not imposed on all competing buyers such as requiring Robinson to give up his job with Clay.

The case law suggests that Clay cannot justify an otherwise illegal price discrimination on the basis that Clay employed the president and major shareholder of Shreve.

In *Fowler Manufacturing Co.* v. *Gorlick*,[107] the defendant argued that even though it charged the plaintiff a higher price for its product, there was no liability for price discrimination because the plaintiff fared just as well in view of other concessions defendant had made to the plaintiff. The Ninth Circuit held:

> Equally, without validity under the [Robinson-Patman] Act is Fowler's contention that the question of injury was further required to be considered in relation to such other concessions or adjustments as had

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[105] 543 F.2d 1019, 1024 (2d Cir. 1976), *cert. denied*, 97 S. Ct. 1116 (1977).

[106] 334 U.S. 37, 42 (1948); *see also* Bruce's Juices, Inc. v. American Can Co., 87 F. Supp. 985 (S.D. Fla. 1949), *aff'd*, 187 F.2d 919 (5th Cir. 1951), *opinion modified*, 190 F.2d 73 (5th Cir. 1951), *appeal dismissed*, 342 U.S. 875 (1951); Millstein, *The Status of "Availability" Under Section 2(a) of the Robinson-Patman Act*, 42 N.Y.U.L. Rev. 416 (1967).

[107] 415 F.2d 1248 (9th Cir. 1969), *cert. denied*, 397 U.S. 1012 (1970).

> occurred between it and Thrifty through the course of the period involved, and the fact of damage had to be resolved on the basis of whether, in its over-all dealings with Fowler, Thrifty had come out in as good or better a position as Keller, Rosin and Mesher.[108]

Although Robinson was paid by Clay for the work done for Clay, this does not negate or justify the damage done to Shreve by Clay's price discrimination.

In *Dayco Corp.*[109] the respondent argued before the Federal Trade Commission that there was no price discrimination because lower prices were available to all "sub-jobbers" if they would form "jobber groups" to make their purchases. The Commission rejected the contention, stating: "Lower prices are not 'available' where a purchaser must alter his purchasing status before he can receive them."[110] In this case, Clay would require an even more fundamental change in status to qualify for participation in the volume discount plan – it would require the termination of Robinson's participation in Shreve's management.

In *Perma Life Mufflers, Inc.* v. *International Parts Corp.*,[111] the defendants argued that the plaintiffs could not recover for antitrust violations arising from the defendants' franchise agreements because the plaintiffs had participated in and profited from defendants franchises. The Supreme Court stated:

> [W]e cannot accept the Court of Appeals' idea that courts have power to undermine the antitrust acts by denying recovery to injured parties merely because

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[108] *Id.* at 1253-54.

[109] Dayco Corp. (Dayton Rubber Co.), 66 F.T.C. 451 *rev'd on other grounds* 362 F.2d 180 (6th Cir. 1966).

[110] *Id.* at 470-71.

[111] 392 U.S. 134 (1968).

> they have participated to the extent of utilizing illegal arrangements formulated and carried out by others. . . . The argument that such conduct by petitioners defeats their right to sue is completely refuted by the following statement from *Simpson*: "The fact that retailers can refuse to deal does not give the supplier immunity if the arrangement is one of those schemes condemned by the antitrust laws." 377 U.S., at 16. Moreover, even if petitioners actually favored and supported some of the other restrictions, they cannot be blamed for seeking to minimize the disadvantages of the agreement once they had been forced to accept its more onerous terms as a condition of doing business.[112]

Similarly, Shreve cannot be denied recovery for an antitrust violation on the basis that its president entered into a separate contract of employment; Clay may not use Shreve's acquiescence to an antitrust violation to escape liability to it.

Thus, the court holds that the employment of Robinson by Clay in 1971 through 1973 cannot justify an otherwise illegal price discrimination.

D. Violation of 2(a) in the 1971 through 1973 Period

In the period from 1971 through 1973 the plaintiff suffered price discrimination and has proven every element of a violation of section 2 (a) of the Robinson-Patman Act.

E. Amount of Damages in the 1971 through 1973 Period

1. Past Profits

Section 4 of the Clayton Act[113] provides a private cause

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[112] *Id.* at 139-40.

[113] 15 U.S.C. § 15 (1970).

of action for damages for any person injured in his business or property as a result of a violation of antitrust laws. In order to recover damages for a violation of section 2 (a) of the Robinson-Patman Act, the plaintiff must prove two things. First, it must establish "a causal connection between the price discrimination in violation of the Act and the injury suffered." *Perkins* v. *Standard Oil Co.*[114] Second, the plaintiff must prove the amount of damages with reasonable certainty. *Zenith Radio Corp.* v. *Hazeltine Research, Inc.*;[115] *Bigelow* v. *RKO Radio Pictures*;[116] *Volasco Products Co.* v. *Lloyd A. Fry Roofing Co.*[117]

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[114] 395 U.S. 642, 648 (1969).

[115] 395 U.S. 100 (1969); *see also* Story Parchment Co. v. Paterson Co., 282 U.S. 555 (1931). In *Zenith* the Court stated:

> Trial and appellate courts alike must also observe the practical limits of the burden of proof which may be demanded of a treble-damage plaintiff who seeks recovery for injuries from a partial or total exclusion from a market; damage issues in these cases are rarely susceptible of the kind of concrete, detailed proof of injury which is available in other contexts.

Id. at 123.

[116] 327 U.S. 251 (1946). In *Bigelow* the Court held that in the absence of more precise proof, the fact finder could conclude as a matter of just and reasonable inference from the proof of defendants' wrongful acts and their tendency to injure plaintiffs' business, and from the evidence of the decline in prices, profits and values, not shown to be attributable to other causes, that defendants' wrongful acts had caused damage to the plaintiffs.

[117] 308 F.2d 383 (6th Cir. 1962), *cert. denied*, 372 U.S. 907 (1963).

The Sixth Circuit in *Volasco Products* stated:

> We recognize that the plaintiff is not required to prove its damages with absolute mathematical accuracy and that the plaintiff is not to be denied damages simply because they cannot be computed with exactness. However, the evidence must furnish some approximation of the actual damages so that they may be determined with reasonable certainty.

308 F.2d at 392.

With regard to the first factor, the Supreme Court stated in *Perkins*: "If there is sufficient evidence in the record to support an inference of causation, the ultimate conclusion as to what that evidence proves is for the jury [or the trier of fact]."[118] In this case, there is sufficient evidence in the record to conclude that the plaintiff's lost sales in the years 1971 through 1973 were caused by Clay's illegal price discrimination.

Clay dealers were influenced in their pricing by the volume discount expected at the end of the year and Clay's denial of the volume discount to Shreve affected the prices at which Shreve could sell Clay equipment.[119] The substantially higher prices paid for each item of farm equipment by Shreve to Clay directly affected Shreve's profitability and ability to compete. Because of the higher prices charged by Clay, Shreve lost sales to competitors who paid lower prices.

Further, Shreve's expert witness established that Clay's volume discount had a significant effect on a dealer's growth.[120] Specifically, it was Dr. Marion's opinion, based on his detailed analysis of this case, that the effect of the denial of the volume discount on Shreve would be that Shreve "would suffer a loss or a reduced level of sales growth as a result of not receiving the discount."[121]

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[118] 305 U.S. 648.

[119] *See* note 43 *supra*.

[120] *See* text accompanying notes 43-45 *supra*.

[121] *Tr.* 465-66; *see* text accompanying note 44 *supra*. Clay has argued that the multiple regression analysis made by Dr. Marion must be discounted because multiple regression analyses prove nothing about causations. *See* Defendant's Post-Trial Brief at 57; Tr. 779-81. However, although Dr. Marion conceded that "regression analysis by itself gives us no indication of causality, all it shows is the degree of relationship," he later explained in detail the economic logic and analytical rationale for his conclusion that Clay's volume discounts had "a signifi-

With regard to whether the plaintiff has proved its damages with resonable certainty, the court holds that Shreve has adequately proved damages from lost profits in the years 1971 through 1973, and that Shreve is entitled to recover those damages in accordance with section 4 of the Clayton Act.[122] The estimates of lost past profits were established by the testimony of Dr. Marion based upon his multiple regression analysis.[123] The court holds that Dr. Marion's estimates of lost past profits were reasonable[124] and that Shreve has established with a reasonable

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cant effect on a dealer's growth." Tr. 442, 462-65. And it was Dr. Marion's opinion, based on sound statistical analysis and economic logic that there was a "causal relationship" between the volume discount and growth. Dr. Marion stated:

> These are operating in tandem, to hypothesize the opposite relationship, however, and to say that . . . percent discount is a function of grow rate would be essentially to say growth rate occurs due to factors totally outside of discount . . . and the economic rationale and logic for that one I have a great deal of difficulty with.
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> It seems to me in a situation like this that it is pretty darn likely that . . . the bonus is a factor, both in terms of encouraging him to grow, his incentive . . . and that once it is received, that it affects his profitability and his economic viability. . . . I think that the logic to me is fairly clear that this is the sort of casual relationship which makes the most sense as an economist.

Tr. 464-65.

[122] 15 U.S.C. § 15 (1970).

[123] Dr. Marion explained the data used with the economic model and the reasons for its use. Tr. 425-32. The results were shown to be statistically significant and valid. Tr. 453-58, 461-62. In estimating lost profits, Dr. Marion was cautious and conservative; he made adjustments in the data used to assure accuracy and conservative estimates. Tr. 467-73.

[124] Dr. Marion compared the sales growth rate Shreve would have experienced under his estimate of Shreve's lost sales with the actual sales growth rate of Clay dealers which received Clay's volume discount and found the rates to be reasonably comparable. Tr. 490-91. He also compared the sales growth rate Shreve would have experienced

certainty that it was damaged because it lost profits in 1971 through 1973 as a result of Clay's price discrimination. The court holds that as a result of the defendant's violation of section 2(a) of the Robinson-Patman Act in 1971, 1972 and 1973, the plaintiff suffered actual damages in the amount of $14,715.[125] This amount represents profits

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under his estimate of lost sales with the actual sales growth rate of two of Shreve's competitors, Vanasdale and Bambauer, and found the rates to be consistent. Tr. 492-93.

[125] This figure is derived from the calculations presented by Shreve. *See* Plaintiff's Exhibit 103. Shreve's calculation of total lost net profits resulting from an antitrust violation in 1971 through 1974 was $19,732. To determine the damages attributable to the 1971 through 1973 period, the court first accepted the calculation of $830,818 as the total net estimated purchases of Clay equipment by Shreve if Shreve had received the volume discount in the four year period from 1971 through 1974. (Plaintiff's Exhibit 103 states this figure as $831,818 but this is an arithmetic error.) The court then looked to the best estimate of purchases in 1971 through 1973 if Shreve had received the volume discount in that period: $589,031. The court then subtracted the adjusted actual purchases from those amounts: $311,960 for 1971 through 1974; $202,102 for 1971 through 1973. This yielded the figures of $518,858 in total net purchases foregone in the four-year period and $386,929 in total net purchases foregone in the three-year period from 1971 through 1974. To find the lost net profit during the 1971 through 1973 period, the court found the ratio of total net purchases foregone in 1971 through 1973 ($386,929) to total net purchases in 1971 through 1974 ($518,858) and applied that ratio to Shreve's estimate of lost net profits on lost sales of Clay equipment during the 1971 through 1974 period: $19,732. This produced the figure of $14,714.78 in lost net profits on lost sales of Clay equipment resulting from a denial of the volume discount in 1971 through 1973. The calculations may be summarized as follows:

Volume Discount Receipt Years	1971-1974	1971-1973	1974
Total Net Estimated Purchases	$830,818	$589,031	$241,787
Adjusted Actual Purchases	(311,960)	(202,102)	(109,858)
Total Net Purchases Foregone	518,858	386,929	131,929
Total Lost Sales During Period	622,584	464,281	158,303
Lost Gross Profits During Period	78,930	58,861	20,069
Estimated Increase In Expenses	(59,198)	(44,146)	(15,052)
Lost Net Profits During Period	19,732	14,715	5,017

which were lost in the years 1971, 1972, and 1973 as a result of Clay's price discrimination in the three-year period from 1971 through 1973.

2. Future Profits

The plaintiff seeks to recover lost future profits as additional damages. Shreve contends that as a result of the denial of the volume discount, Shreve's growth was impaired and that it is entitled to damages for the lost profit in the years in the future in which profits will be diminished because of the past impaired growth.[126]

Generally, damages for lost future profits are recoverable in suits arising from violations of the Robinson-Patman Act. *Volasco Products Co.* v. *Lloyd A. Fry Roofing Co.*[127] Further, future damages may be established by economic projections. *Holleb & Co.* v. *Produce Terminal Cold Storage Co.*[128] However, to recover lost future profits the plaintiff must prove to the trier of fact that it sustained actual damages and the trier of fact must be able to determine the amount of future profits with reasonable certainty. No speculative, remote, or uncertain damages may be recovered. See *Kidd* v. *Esso Standard Oil Co.*[129]

Even approaching the question of the amount of future damages liberally,[130] the court is unable to determine with any certainty the amount of lost future profits that are attributable to the violation in the years 1971 through 1973. Accordingly, any award of damages for lost future

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[126] *See* Tr. 477-85; Plaintiff's Exhibits 106-110.

[127] 346 F.2d 661 (6th Cir.), *cert. denied*, 382 U.S. 904 (1965).

[128] 532 F.2d 29, 36 (7th Cir. 1976).

[129] 295 F.2d 497 (6th Cir. 1961).

[130] *See* Dantzler v. Dictograph Products, Inc., 309 F.2d 326, 330 (4th Cir. 1962).

profits would be speculative, remote and uncertain. Thus, since plaintiff has failed to prove the amount of lost future damages to the court, no recovery for lost future profits will be allowed.[131]

3. General Damages

The plaintiff has claimed additional "general damages" in the amount of the volume discounts denied by Clay. There is disagreement in the courts over whether the amount of the discrimination (for example, the amount of the volume discounts denied) is recoverable in a suit under the Robinson-Patman Act.[132] The Eighth Circuit has allowed recovery of general damages in *Elizabeth Arden Sales Corp.* v. *Gus Blass Co.*[133] and the Ninth Circuit has allowed general damage recovery in *Fowler Manufacturing Co.* v. *Gorlick.*[134] However, the general damage rule was rejected by the Second Circuit in *Enterprise Industries, Inc.* v. *Texas Co.*[135]

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[131] After trial and upon the request of court, Shreve filed on June 5, 1978 a Supplemental Submission Regarding Damages. In Table 4 of that Submission Shreve claimed that based on the figures and formulas produced at trial by Shreve, the amount of foregone net profits 1975 through 1979 attributable to the violation in 1971 through 1973 was $13,499 and the amount of future foregone profits attributable to the denial of the volume discount in 1974 was "Nil." The total claim of Shreve for foregone profits on foregone sales during 1975 through 1979 resulting from the volume discount denial for the four year period from 1971 through 1974 was $13,718. Thus, in terms of lost future profits, Shreve claims that it was damaged almost as much by three years of antitrust violation as it would have been by four years of violation. The court finds this unreasonable.

[132] *See* Annot., 9 A.L.R. Fed. 279 (1971).

[133] 150 F.2d 988 (8th Cir.), *cert. denied*, 326 U.S. 773 (1945).

[134] 415 F.2d 1248 (9th Cir. 1969), *cert. denied*, 396 U.S. 1012 (1970).

[135] 240 F.2d 457 (2d Cir.), *cert. denied*, 353 U.S. 965 (1957). *See also* Sun Cosmetics Shoppe, Inc. v. Elizabeth Arden Sales Corp., 178 F.2d 150 (2d Cir. 1949).

The Sixth Circuit dealt with the issue of damages under the Robinson-Patman Act in *Kidd* v. *Esso Standard Oil Co.*[136] The Sixth Circuit in *Kidd* did not explicitly reject the possibility of general damages. However, it did hold that trial court's jury charge that "the plaintiff's right to recover is limited to actual damages, the amount of which must be determined with reasonable certainty from the evidence; and that no speculative, remote, or uncertain damages should be allowed" was a "correct statement of legal principles pertinent to the case."[137] The court approved the jury verdict of no damages on the basis that "[t]he record fails to show that those competitors . . . lowered the price at which they sold to the public, at all; nor is there proof in the record to show or tend to show that, during the period involved, the plaintiff-appellant lost any customers, or that he lost any profit from the operation of his [business]."[138] The court so held despite the finding that the plaintiff had paid a higher price than its competitors. It thus appears that general damages were impliedly disapproved in this circuit. Applying the above holding, the court holds that Shreve is not entitled to recover the amount of the denied volume discounts as damages.[139]

II. THE 1974 PERIOD

The Shreve account with Clay was not always current in 1974.[140] Clay required all its dealers to keep their accounts current in order to qualify for the volume discount. This

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[136] 295 F.2d 497 (6th Cir. 1961).

[137] *Id.* at 498-99.

[138] *Id.* at 498.

[139] *See* text accompanying note 49, *supra*.

[140] *See* text accompanying note 71 *supra*.

condition was uniformly and consistently applied.[141] The volume discount was functionally available to Shreve in 1974; the only barrier to Shreve's receipt of the discount was the requirement that it keep its account current.[142] The cause of the injury to Shreve in 1974, therefore, was not Clay's price discrimination, but Shreve's own failure to keep its account current. See *FLM Collision Parts, Inc.* v. *Ford Motor Co.*,[143] *Tri-Valley Packing Association* v. *FTC*.[144] Consequently, plaintiff may recover no damages for the price difference in 1974.

III. CONCLUSION

Shreve proved that there was a violation of section 2 (a) of the Robinson-Patman Act in 1971, 1972, and 1973. Further, Shreve proved that it sustained actual damages in the amount of $14,715 as a result of the violation of the Act in those three years. Pursuant to section 4 of the Clayton Act, Shreve is entitled to treble damages, reasonable attorney's fees and costs. Accordingly, it is awarded a judgment in the amount of $44,145, plus reasonable attorney's fees and costs.

IT IS SO ORDERED.

/s/ JOHN M. MANOS
United States District Judge

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[141] *See* text accompanying notes 68-70 *supra*.

[142] *See* text accompanying note 66 *supra*.

[143] 543 F.2d 1019 (2d Cir. 1976), *cert. denied*, 97 S. Ct. 1116 (1977). In *FLM*, the Second Circuit stated that "even when a seller has a dual pricing system, if the lower price is available to all purchasers, not only in theory but in fact, *see FTC* v. *Morton Salt Co.*, 334 U.S. 37, 42 (1948), there is no violation of § 2(a)."

[144] 329 F.2d 694, 703-04 (9th Cir. 1964). *See also* Millstein, *The Status of "Availability" Under Section 2(a) of the Robinson-Patman Act*, 42 N.Y.U.L. Rev. 416, 421 n. 18 (1967).

UNITED STATES DISTRICT COURT
FOR THE
NORTHERN DISTRICT OF OHIO,
EASTERN DIVISION

Civil Action File No. C75-242A

SHREVE EQUIPMENT, INC.,
Plaintiff,

vs.

CLAY EQUIPMENT CORPORATION,
Defendant.

JUDGMENT

(Filed November 13, 1978)

This action came on for trial before the Court, Honorable John M. Manos, United States District Judge, presiding, and the issues having been duly tried and a decision having been duly rendered,

It is Ordered and Adjudged that the plaintiff is awarded a judgment in the amount of $44,145 plus reasonable attorney's fees and costs.

Dated at Cleveland, Ohio, this 13th day of November, 1978.

/s/ JOHN M. MANOS
United States District Judge

Opposition

Office - Supreme Court, U.S.
FILED
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ALEXANDER L. STEVAS,
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No. 81-297

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

SHREVE EQUIPMENT, INC.,
Petitioner,

v.

CLAY EQUIPMENT CORPORATION,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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RESPONDENT'S BRIEF IN OPPOSITION

JOHN R. KEYS, JR.
(Counsel of Record)
JOHN R. REILLY
WINSTON & STRAWN
2550 M Street, N.W.
Washington, D.C. 20037
(202) 828-8400

Counsel for Respondent

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D. C.

QUESTIONS PRESENTED

1. Whether a manufacturer's denial of annual volume discounts on sales to a dealer either violated Section 2(a) of the Robinson-Patman Act or caused injury to the dealer within the meaning of Section 4 of the Clayton Act where the dealer's president and practical sole owner voluntarily agreed to accept full-time, salaried and commissioned employment by the manufacturer with full knowledge that as long as he was so employed, and because of that employment, the manufacturer would consider the dealer ineligible for those discounts.

2. Whether the court of appeals' consideration and affirmance of the district court's findings of fact that plaintiff's account was not current throughout 1974 constituted reversible error.

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v.

CLAY EQUIPMENT CORPORATION,
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On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

The respondent, Clay Equipment Corporation, respectfully requests that this Court deny the petition for writ of certiorari to review the opinion and judgment of the Sixth Circuit in this case.

OPINION BELOW

The Sixth Circuit's opinion is reported at 650 F.2d 101 (1981).

STATEMENT OF THE CASE

This case involves a highly unusual dual employment-dealer relationship between the parties. The

Court of Appeals' straightforward and common sense analysis of the factual circumstances peculiar to this relationship led to a result which Petitioner now seeks to overturn. The Petitioner, Shreve Equipment, Inc., and its practical sole owner Robert Robinson, over a period of seven years, freely chose an arrangement whereby Robinson worked full time as respondent Clay Equipment's territory manager in northeastern Ohio while simultaneously managing Shreve, an independent Clay dealer. The case arose when, nine years after making this agreement and having been compensated accordingly, Robinson repudiated it, alleging that an important, bargained term of the agreement violated the Robinson-Patman Act. The relevant facts are essentially as set forth in the Sixth Circuit's opinion; we discuss them here only as necessary to clarify the Petitioner's statement.

A. The Agreement and Relationship Between Clay and Shreve

It is not clear from the record who initiated the idea of Robinson becoming Clay's territory manager in 1966 but it is clear, as Petitioner notes, that Clay was at first quite opposed. Petition for Writ of Certiorari, 6 [hereinafter cited as Petition]. Clay nevertheless later agreed to hire Robinson at least through the end of the year, and a contract was signed to that effect.

Whatever the understanding between the parties in those first few months, the issue of Shreve's eligibility for Clay's volume discount program was raised squarely at the end of 1966. When Robinson entered into a new employment agreement in January 1967, he expressly agreed that Shreve would be ineligible for the volume discounts. Robinson subsequently executed a

series of three more employment agreements with Clay, covering the period 1968 through 1973, and each time it was understood between the parties that Shreve would not be eligible for volume discounts in those years.

This provision of the arrangement constituted an important, bargained term of the parties' employment relationship. Clay was concerned that if Robinson was its territory manager and if Shreve was also eligible for the discount, there would be too great an incentive for Robinson to divert sales through his own dealership to the detriment of other dealers in the territory and the sales organization as a whole. Clay has taken the same position with respect to other employee/dealers but in fact has entered into such dual relationships on only a few occasions over the years.

Under the terms of his agreements, Robinson was free to terminate his employment with Clay at any time upon 10 days notice. Petition, at 6a. Had Robinson chosen to do this, Shreve would have become immediately eligible for the volume discount. At no time did Clay ever threaten to terminate Shreve as a dealer if Robinson did not accept employment with Clay or Clay's position with respect to the volume discount. App. 11a-12a.[1] Robinson thus freely chose to work for Clay with one of the terms of his employment being that his dealership would be ineligible for volume discounts.

In exchange, Clay paid Robinson a fixed salary plus commissions ranging from 3.5 to 6.0 percent on all purchases of Clay equipment made by dealers in the

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[1] References to the lower court opinions in this case are cited to the Appendix to the Petition for Certiorari.

territory. App. 6a. Under this agreement Clay paid Robinson a total of $16,000 in salary and $41,000 in commissions for the period 1971 through 1974. App. 7a. The commissions alone for the years 1971-73 were in excess of $25,000. Robinson used this employment income from Clay to benefit Shreve directly. While Robinson was employed by Clay, Shreve paid Robinson no salary or commissions even though he continued to act as Shreve's manager and principal salesman. App. 10a.

As noted by the Court of Appeals, Robinson's duties as Shreve's prime actor and as Clay's territory manager overlapped considerably. App. 7a. Traveling throughout his territory as Clay's representative and at Clay's expense, Robinson was in a highly advantageous position to contact customers and develop business for Shreve, both in Clay equipment and other brands as well. App. 7a, 10a. An important aspect of Robinson's dual function was the fact that he earned substantial commissions on every purchase made by Shreve's supposed competitors.

Shreve prospered under this arrangement. Based on dollar volumes purchased, Shreve was Clay's largest of approximately 90 dealers in Ohio in 1972 and 1974; it was third in 1971 and fourth in 1973. App. 5a, n.3. Clearly, Shreve's purchase volumes[2] would have enabled it to receive the highest rates of discount offered by Clay had it chosen to deal with Clay solely as a dealer. App. 9a. Robinson and Shreve, however, chose

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[2] The amounts of Shreve purchases were as follows: 1971—$63,045.85; 1972—$78,442.04; 1973—$74,447.95; and 1974—$140,147.30. App. 5a, n.3.

a different, dual relationship with Clay and thereby knowingly declined to take advantage of volume discounts which would have averaged about $5,200 per year for the years 1971-73. This election presumably was made on the basis of a simple weighing of the amounts of Shreve's potential discounts against the substantially greater amounts Robinson received in compensation from Clay.

As the Sixth Circuit noted, however, Clay was willing to modify its position as long as Robinson was willing to separate the functions of Clay's territory management from those of Shreve's management, thereby mitigating the potential for conflict with other dealers.[3] App. 12a-13a. Robinson indicated that when his son graduated from college the son would be able to manage Shreve on a day to day basis, leaving the elder Robinson to work full time for Clay. App. 7a. It was agreed Shreve would be eligible for the volume discount in the 1974 discount year on this basis. The District Court found, and the Sixth Circuit affirmed, however, that Clay had a longstanding published condition which it applied uniformly to all dealers that eligibility for the annual discount was contingent upon the dealer's keeping its account with Clay current at all times during the year. App. 7a, 13a, 26a, 45a-46a. In the view of both lower courts, Shreve failed to maintain a current account in 1974 and was denied the volume discount for that reason. *Id.*

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[3] Petitioner's assertion, Petition, at 7, that Clay's General Sales Manager, Mr. Chamness, admitted to Robinson that Clay's denial of discounts to Shreve were illegal is unwarranted. Chamness denied this assertion at trial and neither lower court entered any finding that such an admission was ever made. See Petition, at 25a.

In April 1975, Robinson was released as Clay's territory manager and his dealership terminated for reasons unrelated to and not at issue in this case. App. 3a, n. 1.

B. Alleged Injury to Competition

The District Court found that the denial of discounts to Shreve in 1971-73 substantially lessened competition between Shreve and certain other Clay dealers. The Sixth Circuit assumed without deciding that this was so but noted that the lower court's finding was "fraught with inconsistencies." App. 5a. Shreve's theory at trial, adopted by the District Court, contended, in effect, that any Clay dealer situated within 50 miles of Shreve or whose theoretical 50-mile trading area overlapped with that of Shreve was necessarily engaged in competition with Shreve. Six Clay dealers were identified as Shreve competitors by this method. This theoretically-based finding was made without any substantial evidence that these dealers actually competed with Shreve and despite direct testimonial and documentary evidence from several of the dealers, and Clay's expert economist, that these dealers did not and, in some cases, would not compete with Shreve. No evidence whatsoever was ever offered to show the actual competitive structure of the relevant market area in terms of dealer competitive activity or customer purchasing behavior.

C. Alleged Damage to Shreve

The District Court also found that Shreve had lost substantial sales and net profits as a result of Clay's denial of volume discounts in 1971-73. Damages were found in the amount of $14,715 based on plaintiff's

expert's estimate of how much greater Shreve's level of purchases, sales, and net profit would have been had Shreve received annual volume discounts of 7.46 percent. The Court of Appeals also apparently regarded these findings as suspect. App. 5a, n.4. Shreve tried but failed to prove a single specific instance in which it lost a sale to another Clay dealer as the result of the other's receipt of the volume discount. Instead, Petitioner's proof of damages relied upon its expert's estimates which, as the court below noted, produced some amazingly incongruous results. According to Shreve's theory it *lost* more sales in 1971-74 than it actually made, see *id.*, and, indeed, lost more sales than its purported closest competitors actually made. The damage estimate was based on a rate of net profit several times greater than any rate ever earned by the company. *Id.* And, finally, those damages were premised upon awarding Shreve volume discounts at rates that would have been in most instances greater than those earned by its alleged competitors. In short, we submit, there was no substantial evidence that Shreve actually suffered cognizable antitrust damages.

REASONS FOR DENYING THE WRIT

The Court of Appeals unanimously concluded that under the circumstances of this case, Clay's discounts were functionally available to Shreve because Shreve made an informed, voluntary, and beneficial choice to forego those discounts. Under such circumstances, any injury Shreve might have suffered as a result of not receiving the discount was caused by Shreve's own uncoerced decision not to take advantage of it—not by Clay's actions. App. 9a-11a. As the Sixth Cir-

cuit noted, courts have held consistently that where such a discount is functionally available to the purchaser there is no violation of Section 2(a) of the Robinson-Patman Act either because there is no price discrimination or becasue the discrimination is not the proximate cause of injury. App. 9a.

The decision below turns upon a straightforward analysis of the particular facts of this case and a non-expansive application to those facts of accepted legal principles. Petitioner's assertions of inconsistency with established precedents of this Court and other circuits are illusory. The case raises no important federal question necessitating resolution by this Court and is indeed so fact specific and so narrow that it can have little significance beyond itself. Certainly Petitioner's suggestion that the decision will seriously impede private enforcement of the antitrust laws and decimate the free functioning of our economic system is, to understate it, hyperbole.

1. The Sixth Circuit's Application of the Functional Availability Doctrine is Consistent with the Decisions of this Court and Other Circuits

a) The Decision Below Does Not Conflict With *Morton Salt*, *Fowler*, or *Bruce's Juice's*

The functional availability doctrine originated in the Court's conclusion in *FTC* v. *Morton Salt Co.*, 334 U.S. 37 (1948), that "Theoretically these discounts are equally available to all, but functionally they are not." *Id.* at 42. At issue in *Morton Salt* was a system of quantity discounts on table salt offered to all customers equally but which allowed the larger discounts only for quantities far greater than the requirements or purchasing ability of the vast majority of customers.

The seller's lowest prices could only be obtained when purchases reached 50,000 cases, a level which only five large chain store purchasers had ever been able to achieve. *Id.* at 41-43. The Court's decision that the challenged discounts were not functionally available to all customers was soundly based on the inability of smaller customers to purchase the quantities required to earn the highest rates of discount. *Id.* at 43. The evil to which Congress had directed the Robinson-Patman Act, the Court noted, was the ability of large buyers to secure a competitive advantage over small buyers because of the large buyers' *quantity purchasing ability. Id.* (emphasis added). The decision in *American Can Co.* v. *Bruce's Juices, Inc.*, 187 F.2d 919 (5th Cir. 1951), *modified* 190 F.2d 73 (5th Cir.), *appeal dismissed*, 342 U.S. 875 (1951), adopted the same rationale, following *Morton Salt* and rejecting the availability defense because only about one percent of defendant's customers were able to obtain any discount at all. 187 F.2d at 923-24.

The Sixth Circuit's decision in no way conflicts with the Court's ruling in *Morton Salt* or the Fifth Circuit's decision in *Bruce's Juices*. Here Shreve was a large buyer of Clay equipment. There is no question that Shreve not only had the ability to but that it did in fact purchase quantities of equipment sufficient to earn the highest rates of discount offered by Clay. Shreve could have earned, had it chosen to do so, discounts equal to or greater than its alleged competitors. The reasoning of *Morton Salt*, premised as it was upon quantity purchasing ability, does not dictate a result different from the one reached in this case below.

Petitioner's contention that a conflict exists between the decision below and the Ninth Circuit's opinion in

Fowler Manufacturing Co. v. *Gorlick*, 415 F. (1969), *cert. denied*, 396 U.S. 1012 (1970), is s without merit. The questions considered and a in *Fowler* dealt primarily with whether the had *in fact* been injured by the challenged p crimination. The court concluded, first, that a who proves discrimination under the Robinson- Act is automatically injured at least in the an the discrimination. 415 F.2d at 1253. Havi found the fact of injury to be automatic whe is a discrimination, the court necessarily we reject the defendant's contention that plaintiff been injured in fact because various other co granted plaintiffs had offset the effects of t discrimination. *Id.* at 1253-54. It is this rul Petitioner contends is contrary to the Sixth decision in this case.

Even on its face, this argument appears t no real conflict. The Ninth Circuit was deci question of whether plaintiff had in fact bee while the Sixth Circuit here dealt with the of the causation of the injury it assumed Sh sustained. Moreover, even the Ninth Circui that its decision on this point might have be ent if the concessions or adjustments granted tiff "could be shown to have constituted settl the legal discriminations involved." *Id.* at 1 is precisely the nature of what occurred her basis of the Court of Appeals' decision. Th Shreve's eligibility for the discounts was an i bargained—and not incidental—aspect of th employment/business relationship. And, as Circuit noted, App. 11a, the concessions a ments raised in defense in *Fowler* were con

clusively by the seller whereas in this case Shreve possessed control over whether it would receive Clay's discounts.

Furthermore, to the extent that the *Fowler* result on the issue of the "other adjustments" was a logical extension of its principal conclusion that a plaintiff who receives a discriminatory price automatically suffers injury, the Court's ruling last term in *J. Truett Payne Co.* v. *Chrysler Motors Corp.*, —— U.S. ——, 101 S.Ct. 1923 (1981), expressly overruling *Fowler's* automatic damage rule, further saps *Fowler* of any vitality it had and negates its relevance here. 101 S.Ct. at 1926-28. The method and approach of the *Fowler* case have been thoroughly discredited.

b) The Sixth Circuit's Decision Does Not Conflict With This Court's Decision in *Perma Life Mufflers*.

The Court's decision in *Perma Life Mufflers, Inc.* v. *International Parts Corp.*, 392 U.S. 134 (1968), offers no basis for Petitioner's assertions of conflict. *Perma Life Mufflers* considered and decided the question of whether plaintiffs in a private antitrust action could be barred from recovering damages by the equitable doctrine of *in pari delicto*. *Id.* at 135. Plaintiff muffler and auto parts dealers had claimed that a number of restrictions in their purchase agreements with defendant manufacturer unreasonably restrained trade in violation of Section 1 of the Sherman Act, 15 U.S.C. § 1, and Section 3 of the Clayton Act, 15 U.S.C. § 14. The court of appeals had ruled that the dealers were barred from recovering on their claims because they were *in pari delicto*; they had sought and purchased under the sales agreements knowing of the restrictions

contained in them and had thus participated in the illegal scheme. *Id.* at 137-38. The dealers were equally at fault and thus should not be permitted to recover. This Court rejected that defense and reversed, holding that:

> . . . [T]he doctrine of *in pari delicto,* with its complex scope, contents, and effects, is not to be recognized as a defense to an antitrust action.

Id. at 140.

The conflict Petitioner claims between *Perma Life Mufflers* and the Sixth Circuit's decision here is nonexistent; the apparition is there only because Petitioner ignores the operative facts, context, reasoning, and holding of *Perma Life Mufflers.* Petitioner would expand *Perma Life Mufflers* into a ruling that it is never a defense to any antitrust claim to say that plaintiff voluntarily agreed to the challenged action. This of course is not what the Court held; the *Perma Life Mufflers* ruling dealt specifically with applicability of the *in pari delicto* defense. The Respondent here has never contended and the Sixth Circuit did not rule that Shreve was equally at fault with Clay and should be denied recovery on equitable grounds.

Petitioner's argument that it should not be barred by a forced accession to a violation of law misses the mark entirely and begs the question of whether there was in fact a violation of the Robinson-Patman Act. In *Perma Life Mufflers* there was a clear violation of the Sherman and Clayton Acts. In the present case, however, the nature of the functional availability doctrine tends to negate the existence of the violation altogether. If the lower price is functionally available to a customer who chooses not to take advantage

of it, there is no violation of law. The economic evil associated with an imposed price discrimination is absent. Contrary to Petitioner's complaints of absurdity of result, Petition at 22, there is only logic and common sense in this approach.

The practical differences between the *Perma Life Mufflers* factual context and the facts before the Court are marked. Had the muffler dealers refused to accept Midas' restrictive terms of sale presumably they would have been terminated as dealers and unable to purchase. The result would have been an absolute cessation of business between Midas and the nonconforming dealers, a clear detriment to free trade. Here, however, if Shreve had not accepted Clay's terms for Robinson's employment, Shreve would simply have remained an independent dealer buying from Clay on the same basis as every other dealer and earning the very discounts it claims it was unlawfully denied. It is quite unsurprising and correct, we submit, that the Sixth Circuit found *Perma Life Mufflers* inapplicable to this case. App. 11a-12a. Petitioner's other cited authority is no more on point.

2. The Sixth Circuit's Decision Is Based Upon a Correct Analysis of the Facts, Raises No Important Question of Law for Decision by this Court, and Will Not Hinder Private Enforcement of the Antitrust Laws

Notwithstanding Petitioner's remarkable assertion that the Court of Appeals' decision, if not undone, will render the federal antitrust laws "impotent and ineffective to assure the sound functioning of our economic system," Petition at 13, this case is, we submit, rather narrowly drawn, dictated by sound, if unspectacular, analysis of peculiar factual circum-

stances, and is largely insignificant, except as it decides the dispute between these two parties.

The Sixth Circuit's decision turned upon its analysis of the facts of an unusual dual relationship between Clay and Shreve. This simultaneous employee/dealer arrangement was exceedingly rare even within the Clay organization and we must assume, from the problems inherent in such a relationship and the lack of factually similar case law, that it does not represent a common form of business dealing nationally. The facts simply do not suggest an important recurring problem under the antitrust laws generally or the Robinson-Patman Act in particuar.

The crux of the case as decided below is whether on the facts Shreve made a voluntary choice to forego Clay's discounts. The Court of Appeals decided that it did and we submit that that decision was correct. Robinson's choice of employment was, as a matter of fact, uncoerced, knowing, and beneficial to Shreve. Clay need not have hired Robinson and, more importantly, Robinson need not have worked for Clay in order to maintain an arms length business relationship. If a similar case should arise in the future, it too would turn upon analysis of the particular facts, not upon the application of any broad legal principle enunciated in the Sixth Circuit's decision.

Petitioner portrays the decision below as a new and unwarranted extension of functional availability principles. It is not. The availability defense has been adopted where a price differential resulted from differences in the functional relationship between the seller and its buyers. *See FLM Collision Parts, Inc.*

v. *Ford Motor Co.*, 543 F.2d 1019, 1024-25 (2d Cir. 1976), *cert. denied*, 429 U.S. 1097 (1977). This is essentially what occurred here. Moreover, Petitioner's argument that no previous case has found a lower price functionally available where an affirmative action other than simply buying the product was required of the purchaser, Petition at 14-15, is untenable on its face. Implied in *FLM Collision Parts, supra,* is the affirmative requirement that seller's customers resell to certain wholesale customers in order to obtain the more favorable price. The decision in *Sweeney & Sons Inc.* v. *Texaco, Inc.*, 637 F.2d 105, 120-21 (3d Cir. 1980), *cert. denied,* 101 S. Ct. 1981-82 (1981), impliedly would require customers to relocate their bulk storage facilities or sell to different retailers in order to obtain the greatest hauling allowances. Virtually any case applying the availability doctrine to deny plaintiff's recovery would involve a requirement that the plaintiff purchaser do something other than what it did. This case raises no novel or clearly important question of federal law that needs to be decided by this Court and would in any event, because of its fact specificity, offer a poor vehicle for a decision of broad import.

The threat to private enforcement of the antitrust laws suggested by the Petitioner is imperceptible. The decision below, we submit, would not be readily applicable outside the limited sphere of Section 2(a) of the Robinson-Patman Act. Moreover, the basic proposition for which the decision stands, that the required causal link between an antitrust violation and plaintiff's alleged injury may be broken by the overriding presence of other causes of injury, including plaintiff's own conduct, is already a familiar theme

in antitrust and beyond question. *Bigelow* v. *RKO Pictures, Inc.*, 327 U.S. 251, 264 (1946); *Hanson* v. *Shell Oil Co.*, 541 F.2d 1352, 1360 (9th Cir. 1976), *cert. denied*, 429 U.S. 1074 (1977). Briefly stated, there is no important reason justifying further consideration of the case by this Court.

3. The Decision Below May Be Sustained on Other Grounds

The Court of Appeals found it unnecessary to go further than the issue of functional availability and causation in deciding the case. Nevertheless, the judgment below can be sustained on any one of several additional grounds fully briefed and argued by the parties below. Plaintiff, we submit, failed at trial to establish the requisite injury to competition and also failed to establish by sufficient evidence the fact of any legally cognizable injury resulting from Clay's denial to it of volume discounts. Moreover, the theory and method by which plaintiff attempted to prove the amount of its damages was contrary to the Robinson-Patman Act and decisions of this Court, most notably *Brunswick Corp.* v. *Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477 (1977).

4. The Sixth Circuit's Rejection of the Issues Raised by Shreve's Cross-Appeal Affords No Ground for Review by this Court

The court below affirmed the District Court's denial of damages for 1974 and of future damages. App. 13a. It did in fact discuss the factual basis for this ruling in its opinion, accepting the lower court's findings and analysis of the facts. App. at 7a. Petitioner's cross-appeal principally involved the factual question of whether Shreve had kept its account current throughout 1974. There is no reason for this Court to grant

certiorari to review two lower courts' determinations of strictly factual issues which are not clearly erroneous. *Graver Tank & Manufacturing Co.* v. *Linde Air Products Co.*, 336 U.S. 271, 275 (1949). The decision in *Taylor* v. *McKeithen*, 407 U.S. 191, 194 (1972), relied upon by Petitioner, in which the Court remanded because the lower court's summary reversal had suggested the potential of important constitutional issues, is not to the contrary.

CONCLUSION

For all of the foregoing reasons, Respondent prays that the petition for a writ of certiorari be denied.

Respectfully submitted,

JOHN R. KEYS, JR.
(Counsel of Record)
JOHN R. REILLY
WINSTON & STRAWN
2550 M Street, N.W.
Washington, D.C. 20037
(202) 828-8400

Counsel for Respondent